IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

No. 833.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE ESTATE R. CRAWLEY JONES, BANKRUPT, APPELLEE.

NOTICE OF APPELLEE'S MOTION TO DISMISS APPEAL ALLOWED IN THIS CASE.

The appellant is hereby notified that the appellee, R. Beale Davis, Jr., Trustee, will on Monday, the 17th day of May, 1915, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the brief in support thereof are herewith delivered to you) to the

Supreme Court of the United States at its court-room in the city of Washington, D. C.

RICHARD B. DAVIS and
BARTLETT ROPER, JR.,
Counsel for R. Beale Davis, Jr., Trustee, Appellee.

I hereby certify that on the 19th day of April, 1915, I delivered to C. V. Meredith, Esqr., counsel for Claude M. Dean, appellant, a copy of the above notice and a copy of the motion and brief therein referred to.

BARTLETT ROPER, JR.

IN THE

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MOTION OF APPELLEE TO DISMISS APPEAL ALLOWED IN THIS CASE.

Now comes R. Beale Davis, Jr., trustee of the estate of R. Crawley Jones, bankrupt, appellee, by Richard B. Davis and Bartlett Roper, Jr., his counsel, and moves this honorable court to dismiss the appeal heretofore allowed by it in this cause for the following reasons:

Claude M. Dean, the appellant herein, is the same Claude M. Dean who was, on November 16, 1914, by this honorable court denied a writ of *certiorari* in this suit. The purpose of this suit is to have declared invalid and of no force and effect a lien claimed by said appellant on the proceeds of the sale of certain property formerly belonging to one R. Crawley Jones. The lien claimed by said appellant was by virtue of a certain deed of trust made by the said R. Crawley Jones to secure notes held by appellant. The said Jones was duly adjudged a bankrupt and this suit was instituted and both the District Court and the Circuit Court of Appeals below decided that the deed of trust was invalid and the lien claimed by appellant of no force and effect. As above stated a writ of *certiorari* was denied by this honorable court.

After this writ of *certiorari* was denied and after the mandate of the said Circuit Court of Appeals had issued, and before this appeal was allowed, the said Claude M. Dean, appellant here, voluntarily appeared before the United States District Court for the Eastern District of Virginia and filed and had the court allow as an unsecured claim against the estate of R. Crawley Jones, bankrupt, the claim which he now, by this appeal, seeks to have declared a secured claim.

Appellee maintains that the above stated action of said appellant, and other action taken by him before said United States District Court for the Eastern District of Virginia, in said matter of R. Crawley Jones, bankrupt, as is more fully set out in a brief filed with this motion, amount to a waiver and abandonment by appellant of the claim which by this appeal he seeks to maintain, and are only to be understood as a solemn admission by appellant of the soundness and correctness of the decree here appealed from.

Appellee therefore respectfully submits that this appeal, presenting as it does only the question of the validity of a lien claimed by appellant, the invalidity of which he, him-

self, has, before a court of competent jurisdiction, solemnly admitted, presents only a moot question, and one which appellant should not be allowed to present, and appellee therefore submits that this appeal should be dismissed.

R. BEALE DAVIS, JR., TRUSTEE, APPELLEE,
By RICHARD B. DAVIS and BARTLETT ROPER, JR.,
His Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

No. 833.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, APPELLEE.

BRIEF OF APPELLEE IN SUPPORT OF HIS MOTION TO DISMISS THE APPEAL ALLOWED IN THIS CASE.

The question involved in this appeal is as to the validity of a certain deed of trust made by one R. Crawley Jones dated September 3rd, 1909, and conveying practically all of his property to secure his four negotiable notes, aggregating $1,600.00 given to and held by appellant herein.

Certain creditors of the said R. Crawley Jones, filed proceedings in involuntary bankruptcy against the said R. Crawley Jones and he was on the 25th day of April, 1910, duly adjudged a bankrupt by the District Court of the United States for the Eastern District of Virginia. This adjudication was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit.

In the meantime by agreement the property covered by the said deed of trust had been sold and the proceeds of sale were deposited in the National State and City Bank, Richmond, Virginia to await the determination of the validity of the lien thereon claimed by appellant, the holder of the notes secured by said deed of trust.

Appellee was duly appointed trustee of the estate of said R. Crawley Jones, bankrupt, and on the 5th day of March, 1912, instituted this suit for the purpose of having declared invalid the lien claimed by appellant by virtue of said deed of trust on the proceeds of the sale of the property of said bankrupt. By decree entered by the District Court of the United States for the Eastern District of Virginia on the 14th day of April, 1913, the lien claimed by said appellant was declared invalid and of no force and effect. On appeal, the United States Circuit Court of Appeals for the Fourth Circuit affirmed this decree. Application was then made to this court for a writ of *certiorari* and the same was denied.

After the writ of *certiorari* had been denied and after the mandate of the Court of Appeals had issued, the said Claude M. Dean, the appellant herein, (his claim to a lien on the proceeds of sale of the property of R. Crawley Jones, bankrupt having been determined adversely to him), voluntarily appeared before the District Court of the United States for the Eastern District of Virginia in the matter of R. Crawley Jones, bankrupt, and consented to the entry of a decree filing and allowing as an unsecured claim against the estate of said bankrupt, his claim based on the

notes described in and secured by the above mentioned deed of trust which had been adjudged to be invalid.

On December 19th, 1914, another decree was entered by the said District Court in the matter of R. Crawley Jones, bankrupt, making allowances to counsel for appellee out of the fund arising from the sale of property under said deed of trust by virtue of which the said appellant claimed a lien, and directing the referee in bankruptcy to formulate and report to court a scheme of distribution of said fund among the creditors of said bankrupt. This decree was also entered with the full knowledge and consent of the appellant herein, and the allowance made to counsel was paid on December 22, 1914, and the report of the referee was filed on January 20, 1915. In this report the claim of appellant is duly reported as an unsecured claim against the estate of said bankrupt.

After the said appellant had taken the action as above set out and after the said decrees had been entered in said bankruptcy matter, the appellant herein, with full knowledge of the facts hereinbefore set out, made application to this honorable court for an appeal from the decree of the United States Circuit Court of Appeals for the Fourth Circuit in this cause.

The above statements of fact in this brief are supported by an affidavit of Bartlett Roper, Jr., and by certified copies of the decrees entered by said District Court, filed herewith as a part hereof and it is not believed that the said statements will be denied by appellant. If they are denied, it is respectfully requested that a statement of facts with regard to this matter be obtained from the Honorable Edmund Waddill, Jr., judge of the United States District Court for the Eastern District of Virginia, before whom the said appellant appeared and in whose court the matter of R. Crawley Jones, bankrupt, is pending.

It is respectfully submitted that Claude M. Dean, appellant herein, having voluntarily and in a court of compe-

tent jurisdiction admitted the invalidity of the lien now claimed by him, after its invalidity had been established by a decree of the United States Circuit Court of Appeals for the Fourth Circuit, and after a writ of *certiorari* had been denied him by this honorable court and having consented to a distribution of the fund on which he theretofore claimed a lien, and filed his claim as an unsecured creditor, should not now, in this appeal, be allowed to take a position and make a contention directly opposed to his own voluntary action and admission, and that he is, and should be, estopped to prosecute this appeal, and that the question here presented is, by the voluntary action and admission of the said appellant, made only a moot question.

Wherefore it is respectfully submitted that the appeal granted to the said Claude M. Dean should be dismissed.

RICHARD B. DAVIS and BARTLETT ROPER, JR.,
Counsel for Appellee.

AFFIDAVIT OF BARTLETT ROPER, JR.

EASTERN DISTRICT OF VIRGINIA,
CITY OF PETERSBURG,—TO-WIT:

Before me, John S. Tynes, a notary public, in and for the city of Petersburg, in the Eastern District of Virginia, personally appeared this day Bartlett Roper, Jr., who being first duly sworn, deposes and says as follows:

On the 27th day of November, 1914, after the petition of Claude M. Dean for a writ of *certiorari* to the U. S. Circuit Court of Appeals for the Fourth Circuit in that certain equity cause styled "*Claude M. Dean, appellant,* v. *R. Beale Davis, Jr., trustee, appellee,*" had been denied by the Supreme Court of the United States, to-wit: On November 16, 1914, and after the mandate of the said Circuit Court of Appeals in said equity cause had issued, to-wit: On November 24th, 1914, this affiant, as attorney for the said R. Beale Davis, Jr., Trustee of the estate of R. Crawley Jones, bankrupt, appellee in said equity case, presented to the Honorable Edmund Waddill, Jr., judge of the District Court of the United States, for the Eastern District of Virginia, at Richmond, Virginia, a draft of a decree to be entered in the matter of R. Crawley Jones, bankrupt, pending in said District Court, directing the transfer by Joseph P. Brady, clerk of said court, of the sum of $1,634.00 from the National State and City Bank, Richmond, Virginia, to the Planters National Bank, of said city, the designated depository of the said court for bankruptcy funds. As directed by a former decree entered in said matter of R. Crawley Jones, bankrupt, the said sum of $1,634.00 had been deposited in said National State and City Bank to await the decision of the United States Courts as to the validity of a certain deed of trust executed by the said R. Crawley Jones, bankrupt, securing the payment of certain

notes of said bankrupt held by the said Claude M. Dean aggregating the sum of $1,600.00 and interest—the net sum of $1,634.00 having been realized from the sale of the property under said deed of trust and the said equity suit styled, *"R. Beale Davis, Jr., trustee, complainant,* v. *Claude M. Dean, defendant,"* having been instituted for the purpose of testing the validity of said deed of trust.

The said Claude M. Dean objected to the entry of said decree directing the transfer of said sum of $1,634.00 unless there was inserted therein a clause filing and allowing his said claim of $1,600.00 and interest as an unsecured claim against the estate of said R. Crawley Jones, bankrupt, insisting that he had a right to file his claim and have the court allow same as an unsecured claim against the estate of said bankrupt and thereby save him the trouble and expense of having to appear before the referee at Petersburg, Virginia.

On December 4th, 1914, the said Claude M. Dean and this affiant, as attorney for said R. Beale Davis, Jr., trustee, personally appeared before the Honorable Edmund Waddill, Jr., judge of said court, at his office in the city of Richmond, Virginia, and after due consideration of the matter it was then and there distinctly understood and agreed by and between the said Claude M. Dean and this affiant, that, if James M. Quick, Jr., attorney-at-law, of Petersburg, Virginia, who represented R. E. Blakey, a large creditor of said bankrupt, had no objection, a clause, such as wished by the said Claude M. Dean, filing and allowing his claim as an unsecured claim against the estate of said bankrupt, would be inserted in the draft of said decree and the decree entered accordingly. This affiant, at the request of the court, saw the said James M. Quick, Jr. on his return to the city of Petersburg, and notified the court, that the said James M. Quick, Jr., had no objection to the insertion in said draft of decree of a clause such as wished by the said Claude M. Dean, filing and allowing his

claim as an unsecured claim against the estate of said bankrupt, and the said decree was accordingly entered by said court as of November 27th, 1914. As directed by said decree, the said sum of $1,634.00 was duly withdrawn from the said National State and City Bank and placed on deposit in the said Planters National Bank, the designated depository of the said court for bankruptcy funds. A certified copy of said decree is hereto attached, marked "A," as a part of this affidavit.

On the 19th day of December, 1914, another decree was entered by said court in the said matter of R. Crawley Jones, bankrupt, making certain allowances, out of the said fund of $1,634.00, to this affiant, as attorney for certain petitioning creditors as well as counsel for the said R. Beale Davis, Jr., trustee in said equity cause styled *"R. Beale Davis, Jr., trustee,* v. *Claude M. Dean,"* and directing that B. C. Syme, Esq., referee in bankruptcy, at Petersburg, Virginia, formulate and report to court a scheme of distribution of the fund remaining in said Planters National Bank to the credit of the court in said matter. This decree was entered by the court with the full knowledge and consent of the said Claude M. Dean. On December 22, 1914, this affiant was paid out of said fund the amount of the allowances made him by said decree. A certified copy of said decree is hereto attached, marked "B," as a part of this affidavit.

The said referee in bankruptcy, acting under said order of reference contained in said decree, completed his report, and on the 20th day of January, 1915, the same was filed in the clerk's office of said District Court. In said report the claim of the said Claude M. Dean is duly reported as an unsecured claim against the estate of said bankrupt.

After the above two decrees had been entered in the said matter of R. Crawley Jones, bankrupt, with the full knowledge and consent of the said Claude M. Dean, the said

Claude M. Dean made application to the Supreme Court of the United States for an appeal from the decree entered by the United States Circuit Court of Appeals for the Fourth Circuit in the said equity cause styled *"Claude M. Dean, appellant,* v. *R. Beale Davis, Jr., trustee, appellee,"* invalidating and declaring null and void the said lien claimed by him on said fund of $1,634.00 and on the 27th day of January, 1915, more than a month after the above two decrees had been entered in the said bankruptcy matter, was allowed an appeal by one of the justices of the United States Supreme Court.

The said Claude M. Dean knows that the facts as above set out are true and he cannot deny the same.

BARTLETT ROPER, JR.

Sworn to before me, and subscribed in my presence, this 15th day of April, A. D. 1915.

(Seal) JNO. S. TYNES,
Notary Public for City of Petersburg, Va.

(10c in U. S. Internal Revenue Documentary Stamps attached to original.)

COPY DECREE NOV. 27, 1914.

"A."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

In the matter of
R. CRAWLEY JONES,
Bankrupt. } IN BANKRUPTCY.

It appearing to the court that, as directed by a decree entered in the above matter on December 6, 1911, W. P. Wells, substituted trustee, on February 21st, 1912, deposited in the National State and City Bank, Richmond, Virginia, to the credit of the court in this cause the sum of $1,634, and filed the certificate of said bank with Joseph P. Brady, clerk of this court, the said certificate being numbered 7822; and it further appearing to the court from said decree of December 6th, 1911, that the said certificate of said bank should be held by the said Joseph P. Brady, clerk, to await the decision of the United States Courts as to the validity of a certain deed of trust executed by said bankrupt and his wife to E. C. Dean, trustee, dated September 3rd, 1909; and it further appearing to the court that on the 14th day of April, 1913, a decree was entered in that certain suit in equity depending in this court styled *"R. Beale Davis, Jr., trustee,* v. *Claude M. Dean, et als,"* invalidating and declaring null and void the said deed of trust of September 3rd, 1909, executed by said bankrupt and his wife, which said decree has been affirmed by the United States Circuit Court of Appeals, Fourth Circuit, as appears from the mandate of said court filed in said equity cause on November 24th, 1914; and it further appearing to the court that the said sum of $1,634, should now be

deposited to the credit of this court in the above mentioned bankruptcy matter in the Planters National Bank, Richmond, Va., the designated depository for bankruptcy funds.

It is, therefore, ordered, that Joseph P. Brady, clerk of this court, draw his check upon the fund so to the credit of this court in the National State and City Bank, Richmond, Virginia, for the sum of $1,634.00, payable to the order of himself as clerk, which said check shall be countersigned by the judge of this court. Thereupon the said Joseph P. Brady, clerk as aforesaid, shall deposit said sum of $1,634, in the Planters National Bank, Richmond, Va., to the credit of the court in the above mentioned matter and file the certificate of said bank among the papers in this cause. This decree is entered without prejudice to the rights of the said Claude M. Dean for his claim of $1,600.00 as a general creditor, which is hereby allowed as an unsecured debt.

EDMUND WADDILL, JR.,
U. S. Judge.

Richmond, Va., 27th November, 1914.

A true copy—Attest:

(Seal) JOSEPH P. BRADY, Clerk.

COPY DECREE DEC. 19, 1914

"B."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

In the matter of
R. CRAWLEY JONES,
Bankrupt. } IN BANKRUPTCY.

On motion of the attorney for the petitioning creditors in the above mentioned matter, as well as of counsel for the trustee in bankruptcy in the equity cause, styled *"R. Beale Davis, Jr., trustee,* v. *Claude M. Dean, et als,"* lately depending in this court, to be allowed out of the fund to the credit of the court in this cause a reasonable compensation for his services as such, the court is of opinion that the sum of $150.00 should be allowed the attorney for the petitioning creditors and that the sum of $250.00 should be allowed the counsel for the trustee in bankruptcy in the above mentioned equity cause as a reasonable compensation for his services in said respective matters.

It is, therefore, ordered that Joseph P. Brady, clerk of this court, draw his check upon the fund to the credit of the court in this matter in the Planters National Bank, of the city of Richmond, Virginia, in favor of Bartlett Roper, Jr., attorney for the petitioning creditors, for the sum of $150.00, and said clerk will likewise draw his check on said fund so to the credit of this court in favor of Bartlett Roper, Jr., attorney for the trustee in bankruptcy in the equity cause aforesaid, for the sum of $250.00, which said two checks shall be countersigned by Thomas B. Snead, referee in bankruptcy.

It is further ordered that B. C. Syme, referee in bankruptcy, formulate and report to court a scheme of distribution of the fund remaining in bank to the credit of the court in this cause.

EDMUND WADDILL, JR.,
U. S. District Judge.

Richmond, Va., Dec. 19, 1914.

A true copy—Attest:

(Seal) JOSEPH P. BRADY, Clerk.

FILED
MAY 15 1915
JAMES D. MAHER

IN THE

Supreme Court of the United States.

October Term, 1914.

No. [redacted] 70

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, ET AL., APPELLEES.

ANSWER AND BRIEF OF APPELLANT ON MOTION OF APPELLEES TO DISMISS APPEAL.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

WYNDHAM R. MEREDITH and
C. V. MEREDITH,
Counsel for Appellant.

Supreme Court of the United States.

October Term, 1914.

No. 833.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, ET AL., APPELLEES.

ANSWER AND BRIEF OF APPELLANT ON MOTION OF APPELLEES TO DISMISS APPEAL.

Before answering the particular positions taken by Appellees in their motion to dismiss the appeal in the above styled cause, appellant respectfully submits that said motion cannot be entertained by this Honorable Court, because its decision involves the consideration of the records in two cases, or at least indispensable parts thereof, which do not accompany the motion. The first case is that entitled, *In the matter of R. Crawley Jones, bankrupt,* and the second case is that of *Claude M. Dean, appellant,* vs. *R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, et al., appellees.* The motion to dismiss this latter suit is not accompanied by the record or any part thereof. Nor has the record or the indispensable parts of the record in the case entitled, *In the matter of R. Crawley Jones, bankrupt,* been printed or filed with said motion. This

we understand to be necessary before this court will consider the motion to dismiss.

Among the indispensable papers in this case not printed and filed with the motion to dismiss is a certain agreement, to be hereafter more particularly referred to, between Bartlett Roper, Jr., counsel of record for the creditors of the bankrupt, R. Crawley Jones, and the appellant, Claude M. Dean, by which it was agreed that the property and goods covered by a certain deed of trust to secure the appellant, Claude M. Dean, should be sold and the money held "*to await the decision of the U. S. Courts as to the validity of such deed of trust.*"

Among the indispensable papers belonging to the record in the case entitled, *In the matter of R. Crawley Jones, bankrupt,* is a letter of the District Judge for the Eastern District of Virginia, Hon. Edmund Waddill, addressed to Bartlett Roper, Jr., and the appellant, Claude M. Dean, dated Feb. 10, 1915, declining to pay out the money obtained from the sale of the property and goods secured by said deed of trust in said *bankruptcy proceedings* in view of the order entered by Mr. Chief Justice White allowing a supersedeas in the suit of *Claude M. Dean, appellant,* vs. *R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt.*

II.

The motion to dismiss is not based on the ground that the appeal was not properly granted. It is admitted that it was taken within the year from the date of the final decree of the U. S. Circuit Court of Appeals; that the cause is a controversy arising in a bankruptcy proceeding; that the matter in controversy in said suit exceeds one thousand dollars, viz., sixteen hundred and thirty-two dollars; that the jurisdiction of the District Court and that of the Circuit Court of Appeals is or was dependent in no wise upon the opposite parties

to the suit or controversy being aliens and citizens of the United States, or citizens of the different States; that this case does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper cause to be reviewed by the Supreme Court on an appeal.

III.

IT IS SOUGHT TO DISMISS THIS APPEAL:

First. Because the appellant has been refused a writ of *certiorari* by this Court. This is true, but this was because *certiorari* was not the proper remedy by which to have the cause reviewed. Such decision, however, does not effect our right to an appeal, which is the proper remedy. It very often happens, as this Honorable Court well knows, that in the many changes that have taken place in the law governing the method of bringing up suits to this Court, counsel are frequently uncertain as to the proper procedure for having their cases reviewed, and therefore resort to both *certiorari* and appeal. So much for the claim that because this Court held *certiorari* not to be the proper remedy that therefore our appeal should be dismissed.

IV.

Second. The next ground on which it is sought to dismiss this appeal, is that it presents only a moot question. This appeal is allowed in an independent or plenary suit brought by the Trustee in bankruptcy of R. Crawley Jones, bankrupt, against your appellant, the beneficiary under a certain deed of trust, made by the bankrupt to secure a cash loan of $1,600, for the purpose of having said deed of trust declared invalid as a preference. After this appeal was allowed, the United States District Judge for the Eastern District of Virginia, Hon. Edmund Waddill, Jr., refused in the cause entitled, *In the matter of R. Crawley Jones, bankrupt,*

to distribute the fund created by the sale of the property and goods covered by said deed of trust, as will be seen from the following letter:

"OFFICE UNITED STATES DISTRICT JUDGE,
EASTERN DISTRICT OF VIRGINIA.

"Edmund Waddill, Jr.

"Richmond, February 10th, 1915.

"Messrs. Bartlett Roper, Jr., and Claud M. Dean,
"Petersburg and Richmond, Va.

"Gentlemen:

"Referring to our interview of yesterday, in reference to the R. Crawley Jones matter, I beg to say that my judgment is that I should not pay the money out in the bankruptcy proceedings, in view of the order entered by Mr. Justice White allowing a supersedeas in the suit filed to set aside the trust deed, executed by the bankrupt on the eve of his bankruptcy.

"In this connection, I beg to suggest the desirability of arranging to have the fund deposited at interest, instead of lying in the usual way of deposits, under the circumstances here.

"Yours truly,

"EDMUND WADDILL, JR.,
"United States Judge."

(The original of this letter is filed with this answer.)

This letter shows that far from the matter being a moot question, the fund is now held by the District Court in the bankruptcy proceedings, to be finally distributed in accordance with the decision of this Honorable Court in this independent suit brought by the Trustee in bankruptcy of R. Crawley Jones, bankrupt, against your appellant.

V.

Third. The next ground on which the motion to dismiss is based, is the claim that the appellant, Claude M. Dean, has released and disclaimed any right as a lien creditor of the bankrupt, R. Crawley Jones, and has given up all his rights under the aforesaid deed of trust, in which he is the benficiary, and is now only claiming as a general creditor of the bankrupt. This contention is sought to be supported by the affidavit of Bartlett Roper, Jr., and by the concluding clause of the decree dated Nov. 27, 1914, and entered *In the matter of R. Crawley Jones, bankrupt,* which decree will be found on page 10 of the printed motion to dismiss. The facts regarding the entry of this decree are as follows:

On November 25, 1914, Bartlett Roper, Jr., addressed a letter to W. R. Meredith, counsel for appellant (the original of which letter is filed and printed with this answer as Exhibit "C. M. D. No. 1") stating that he would apply to the Judge of the District Court for an order directing the clerk of that court to deposit the amount of the certificate representing the proceeds of the sale of the property and goods secured by the aforesaid deed of trust made by the bankrupt, under which he, the appellant, was the beneficiary, in the Planters National Bank, the depository for the bankruptcy funds, and that he would also ask the Judge to make him a reasonable allowance for his services. Appellant's counsel was prevented by another court engagement from being present at the hearing. When this motion came on, the question of the right of an appeal to this court from the decision of the U. S. Circuit Court of Appeals holding the deed of trust dated Sept. 3, 1909, to be invalid, was under investigation by appellant and his counsel. Not knowing whether said appeal would be granted or not, appellant called the attention of the learned Judge of the District Court to the written agree-

ment between Bartlett Roper, Jr., attorney for the creditors of the bankrupt, and the appellant, dated Sept. 18, 1909, whereby if the *U. S. Courts*, which includes this Court, should hold said deed of trust invalid, appellant was to have the right to share in all funds of the said bankrupt, R. Crawley Jones, as a general creditor. This agreement is printed with this answer as Exhibit "C. M D. No. 2."

Appellant states that it is not true, as is asserted in paragraph 2 on page 2 of the printed motion to dismiss, that appellant filed a proof of claim as a gen eral creditor, or took any other steps invalidating his rights as a lien creditor. Appellant never has filed any proof of claim. In fact, the appellant has always from the very beginning of this controversy purposely refrained and refused at all times to go into the District Court and file a proof of claim, either as a secured creditor, or as a general or unsecured creditor. Appellant has never, as asserted on page 4 of the printed brief of Appellee, voluntarily admitted the invalidity of the deed of trust in question; nor has he ever consented to a distribution of the fund on which he claims such lien. The District Judge's attention was called to the express agreement entered into between counsel for the creditors of the bankrupt and appellant, wherein it was agreed that in case appellant's deed of trust should be declared invalid by the *U. S. Courts* he was still to share as a general creditor in any funds of the bankrupt.

Black on Bankruptcy (1914 Ed.), Sec. 563, and cases cited.

Appellant further says, that said decree of November 27, 1914, was not entered by the District Judge with any intention of making appellant lose any of his rights as a lien creditor, but only to protect him in his rights as a general creditor under his agreement with the said Bartlett Roper, Jr., in case said deed of trust was

finally held to be invalid. His rights as a lien creditor could only be enforced in this independent suit, and were in no way involved in the bankruptcy proceedings. The decree entered in said bankruptcy proceedings was not intended to effect nor could it in any way effect this appeal, which appellant subsequently obtained, and this is shown by the above letter of the District Judge, Hon. Edmund Waddill, Jr., refusing to pay out the money arising from the sale of the property and goods under said deed of trust until this appeal has been finally determined by his Court.

The motion to dismiss should be denied.

CLAUDE M. DEAN,
By WYNDHAM R. MEREDITH and
C. V. MEREDITH,
Counsel for Appellant.

UNITED STATES OF AMERICA,
Eastern District of Virginia.

Claude M. Dean, being duly sworn, deposes and says: I have read the foregoing answer and know the contents thereof. The same is true to my own knowledge, except matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

CLAUDE M. DEAN.

Subscribed and sworn to before me this 14th day of May, 1915.

R. E. POWERS,
Deputy Clerk of the District Court of the United States for the Eastern District of Virginia.

EXHIBIT "C. M. D. NO. 1."

LETTER FROM BARTLETT ROPER, JR., TO W. R. MEREDITH.

"Bartlett Roper, Jr.,
"Attorney at Law,
"607-608 Mechanics Building,
"Petersburg, Virginia,
"November 25th, 1914.

"Mr. W. R. Meredith,
"Richmond, Virginia.

"Dear Mr. Meredith:

"Referring to the bankruptcy matter of R. Crawley Jones, Bankrupt, pending in the U. S. District Court at Richmond, Virginia, I wish to advise you that I shall on Friday, or as soon thereafter as I am able to see the Judge, ask for the entry of an order directing Jos. P. Brady, to deposit in the Planters National Bank, the designated depository for bankruptcy funds, the amount of the certificate of the National State and City Bank with accrued interest, which said certificate was deposited with said clerk to await the decision as to the validity by the U. S. Courts of a certain deed of trust dated Sept. 3rd, 1909, executed by said bankrupt and his wife.

"I shall also ask the Judge to make me a reasonable allowance out of said fund for my services as attorney for the petitioning creditors as well as counsel for the trustee in bankruptcy.

"While I do not see how there could be the slightest objection to the entering at this time of such an order, at the same time I would prefer to notify you before asking for same so that you may be heard if you so desire.

"With kindest regards, I am

"Yours truly,

"(Signed) BARTLETT ROPER, JR."

EXHIBIT "C. M. D. NO. 2."

AGREEMENT BETWEEN CLAUDE M. DEAN AND BARTLETT ROPER, JR., ATTORNEY FOR CREDITORS OF R. C. JONES, BANKRUPT.

Filed with Bill of Complaint Sept. 18, 1909.

"It is this day agreed between Claude M. Dean and Barlett Roper, Jr., Attorney for Petersburg creditors of R. C. Jones, that Ed. C. Dean, Trustee, named in D. T. from R. C. Jones & wife, dated Sept. 3rd, 1909, is to resign as trustee & W. P. Wells is to be substituted as trustee in his place with all the powers and without prejudice to the rights of the said Claude M. Dean & the creditors of R. C. Jones. It is further agreed that said W. P. Wells is to deposit all funds that come into his hands in some bank on certificate to await the decision of the U. S. Courts as to the validity of a certain deed of trust from R. C. Jones & wife, dated Sept. 3rd, 1909, securing $1,600 & int. recorded Sept. 11, 1909, or may be paid over on mutual agreement of the said Claude M. Dean & Bartlett Roper, Jr., attorney as aforesaid. It is further understood that in the event said Deed of trust is declared invalid, the said Claude M. Dean to have the right to share in all funds in the hands of the substituted trustee (W. P. Wells) realized from sale of all goods, land, etc., under said D. T. or any other funds of said R. C. Jones from any source as a general creditor. It is further agreed that said E. C. Dean, trustee, is to be paid his expenses so far incurred by him as trustee.

"(Signed) CLAUDE M. DEAN.
"BARTLETT ROPER, JR., Atty."

(The original of this Exhibit is on file with the Clerk of this Court, and the same appears on page 15 of the transcript of record in this case filed in this Court.)

INDEX.

	Page
Statement of the Case	1
District Court held deed of trust invalid under Sec. 67e	4
Circuit Court of Appeals held same invalid under secs. 60b and 67e. . .	5
Specification of Errors	6
The Nine Questions involved in case for determination	6
BRIEF OF THE ARGUMENT	9
First Question. Demurrer should have been sustained	9
Argument in support of same	9
Authorities in support of same	12
Second Question. Jones, the bankrupt, not insolvent	14
Facts and argument in support of same	14
Authorities in support of same	21
Statement of Assets and Liabilities of Jones..	24
Dean did not have reasonable cause to believe him insolvent	26
Third Question. Right of Circuit Court of Appeals to pass upon question as to deed of trust being a preference under Sec. 60b, after District Court having decided this question in favor of Dean and no cross-appeal having been taken by appellees	26
Argument and authorities in support of appellant's contention that the C. C. A. did not have that right	27
Fourth Question. Deed of Trust not a Preference under Sec. 60b	32
Circuit Court of Appeals Conceded that Dean lent the money at the time the mortgage was executed and that the mere knowledge of the lender that the money borrowed is to be applied to an existing debt does not make the security given invalid under Sec. 60b as unlawful preference or under Sec. 67e as a fraud. . .	32
Argument and authorities in support of same..	32
Creditors only may be preferred	36

Page

District Court held Dean not to be a Creditor, 37
Leading case on this point 39
Banks were preferred, if any one, and not Dean, 42
Good faith on part of Dean 43
As to insolvency of Jones 43
Authorities 45
Fifth, Sixth, Seventh and Eighth Questions. Deed of Trust not a Fradulent Transfer under Sec. 67e 46
Complaint does not pray for any relief under Sec. 67e 46
An intent to prefer and an intent to hinder, delay and defraud different 47
Part of Opinion of Circuit Court of Appeals which relates to deed of trust being fraudulent and void under Sec. 67e 48
Argument and authorities showing the ruling of the Circuit Court of Appeals and that of the District Court holding the deed of trust void under Sec. 67e is erroneous.... 50
The estate of the bankrupt was not depleted or diminished by the transaction in question, 58
Authorities on this point 58
Ninth Question. As to alleged forged endorsement, 61
Proof only shows that there was a mere rumor that one of the endorsements on the notes was not genuine 61
Money borrowed being used in the payment of the bankrupt's debts, the transaction does not effect the security given Dean..... 61
Cases in which similar transactions have been upheld 61
Ex parte Stubbins, printed at length 61
Ex parte Caldecott, printed at length 64
Decrees of lower court should be reversed 67

Page

CASES CITED.

On the Question that the Demurrer should have been sustained.

3 A. & E. Enc. of P. & P., page 350, and note 3; 16 Id., page 804 11
1 Barton Ch. Pr. (Ed. 1881), page 216 11
Warren *v.* Moody, 122 U. S. 137, 138 11
Bradbury's Rules of Practice, page 194, Sec. 3 ... 12
Id., page 195, Sec. 5 13
Id., page 201 and cases cited 13

On the Question that an appeal only brings up for review that which was decided adversely to the Appellant.

Chittenden *v.* Brewster, 2 Wall., 195. 28
Loudon *v.* Taxing District, 104 U. S. 774 28
Bolles *v.* Outing Co., 175 U. S. 268 29
Mail Co. *v.* Flanders, 12 Wall. 134, 135 29
Field *v.* Barber Asphalt Co., 194 U. S. 621 30
Pauly Jail Bldg. & Mfg. Co. *v.* Hemphill Co., 10 C. C. A. 600 30
B. & L. Asso. *v.* Logan, 14 C. C. A. 133-136 30
Clark *v.* Killian, 103 U. S. 766-769 31
U. S. *v.* Blackfeather, 155 U. S. 180-186..... 31

On the Question as to the meaning of the phrase "having a reasonable cause to believe such a person insolvent" and as to the burden of proving insolvency.

Grant *v.* National Bank, 97 U. S. 80 21
Stuckey *v.* Savings Bank, 108 U. S. 74 22
In re Carlile, 29 Am. Ban. Rep. 373-383 23
Calhoun City Bank *v.* Cain, 152 Fed., 983. 23

On the Question that the deed of trust in question was not a preference under Sec. 60b of the Bankruptcy Act.

Van Iderstine *v.* National Discount Co., 227 U. S. 575 32-35-45

Page

Ex parte Stubbins, 17 Chancery Division 67, 68 and 69 34-46
Crim *v.* Woodford, 136 Fed. 34, 40 and 41 34
Coder *v.* Arts, 213 U. S. 223 35-45
Githens *v.* Shiffler, 112 Fed., 505-507 35-45
In re Hersey, 171 Fed. 1001 35-45
George *v.* Grant, 28 Hun. (N. Y.) 69; Id. 97 N. Y. 270 35-41-46
In re Baar, 213 Fed. 629-30 35-46
Collier on Bankruptcy (10th Ed.), p. 183 37
Loveland on Bankruptcy (4th Ed.), page 952 38
Davis *v.* Turner, 120 Fed. 605 39-45
Goodnough M. & S. Co. *v.* Galloway, 171 Fed. 940-949 39-46
Tomlinson *v.* Bank, 145 Fed. 824 39-45
Mills, Trustee, &c., *v.* Car. Lumber Co., 90 C. C. A. 154; 21 L. R. A. (N. S..), page 901 and note, 39-40-45
Douglas *v.* Vogeler, 6 Fed. 53 40-46
Stewart *v.* Platt, 101 U. S. 731 40
Remington on Bankruptcy (1st Ed.), Sec. 1314 41
In re Davidson, 109 Fed. 882 41-45
City National Bank *v.* Bruce, 109 Fed. 71. 45
In re Mahland, 26 Am. Bank Rep. 81 45
In re Soudan Mfg. Co., 113 Fed. 808 45
In re Clifford, 136 Fed. 475 46
Sabin *v.* Camp, 98 Fed. 974 46
Thompson *v.* Fairbanks, 196 Fed. 525. 46
In re Maplejack, Ex parte Caldecott, 4 Chan. Div. 155-6 46

On the Question that the deed of trust in question was not fraudulent under Sec. 67e of the Bankruptcy Act.

Coder *v.* Arts (8th Ct.), 152 Fed. 943-947 48
Black on Bankruptcy (1914 Ed.), Sec. 459, p. 1002, 50
Van Iderstine *v.* Natl. Discount Co., 227 U. S. 575 ..... 51, 52-54
Crim *v.* Woodford, 136 Fed. 34 52
Githens *v.* Shiffler, 112 Fed. 505, 507 54
In re Hersey, 171 Fed. 1001 54
Davis *v.* Schwartz, 155 U. S. 640 54
Stewart *v.* Dunham, 115 U. S. 61 55
Estes *v.* Gunter, 122 U. S. 450 55

Page

Smith *v.* Craft, 123 U. S. 436 55
Huntley *v.* Kingman, 152 U. S. 527 55
Southern White Lead Co. *v.* Haas, 73 Iowa 399 ... 55
Coder *v.* Arts, 213 U. S. 223, 242 55
Collier on Bankruptcy (9th Ed.), p. 950 56
Johnson *v.* Lucas, 103 Va. 36 56-57
Johnston *v.* Witt Shoe Co., 103 Va. 611 56
Alsop, et al. *v.* Catlett, et al., 92 Va. 364..... 56
Harvey *v.* Anderson, 2 Va. Dec. 385 56
Williams *v.* Lord, 75 Va. 390 57
Lucas *v.* Clafflin, 76 Va. 269 57
Alex. Dav. Inst. *v.* Thomas, 29 Gratt. 483, 490 57
Skipwith *v.* Cunningham, 8 Leigh 271 57
Collier on Bankruptcy (10th Ed.), p. 803 58
Cook *v.* Tullis, 18 Wall. 332 59
Remington on Bankruptcy, Secs. 1295 and 1320.... 59
In re Noell, 137 Fed. 694 59
Remington on Bankruptcy, Sec. 1295, and Sec. 1278, ...59, 60
In re Hawks, 30 Am. Bank. Rep. 373. 60
Tiffany *v.* Boatman's Institute, 18 Wall. 388-9 66
In re Busby, 124 Fed. 469 67

On the Question as to whether or not a deed of trust given by one merely charged with a crime to secure a present loan, the proceeds of which are used in the payment of certain of his creditors to extricate himself from the embarrassment of the charge, is valid under the bankruptcy act, even though the grantor is insolvent, and the lender knows that the money he is loaning is to be so used.

Ex parte Stubbins, 17 Chan. Div. (L. R. 1881), p. 67, 61
In re Mapleback, Ex parte Caldecott 64

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 364.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, AND W. P. WELLS, SUBSTITUTED TRUSTEE,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

On December 24, 1909, a petition was filed in the District Court of the United States for the Eastern District of Virginia by certain creditors praying that one R. Crawley Jones, be adjudged an involuntary bankrupt, and on April 25, 1910, the said R. Crawley Jones was adjudicated a bankrupt. An appeal was taken by the said Jones from said order adjudicating him a bankrupt to the United States Circuit Court of Appeals for the Fourth Circuit. On this appeal the main conten-

tion was that in giving a certain deed of trust dated Sept. 3, 1909, your petitioner had obtained an unlawful preference. The Circuit Court of Appeals did not approve that position, but, on the contrary, held as follows:

****"That at the time of the filing of the petition he was insolvent and that being so insolvent, he did prefer certain of his creditors *who then held his notes*, which had been theretofore executed for value by him and were then held by the banks in Petersburg, Virginia.****"

And on that ground affirmed the order of the District Court adjudicating the said Jones a bankrupt. (Record, page 56.)

The matter was then referred to the Referee in Bankruptcy, and at a meeting of the creditors held before him, R. Beale Davis, Jr., was elected trustee in bankruptcy of the estate of the said R. Crawley Jones, bankrupt.

Afterwards on March 5, 1912, the said R. Beale Davis, Jr., trustee in bankruptcy of the estate of the said R. Crawley Jones, brought a suit in equity in the District Court of the United States for the Eastern District of Virginia against Claude M. Dean, the beneficiary in a certain deed of trust executed on September 10, 1909, which was given by the said R. Crawley Jones, bankrupt, to secure a cash loan of $1,600, made to him on the 3rd day of September, 1909, by the said Claude M. Dean. The deed of trust being given for a present consideration in pursuance of an agreement to give the specific security at the time the loan was made. The complaint filed in the said cause closed with a special prayer in the following language:

"That the said deed of trust, executed and delivered by the said R. Crawley Jones and Marie E. Jones,

his wife, dated September 3, 1909, and recorded in the clerk's office of the Circuit Court of Dinwiddie County, Virginia, on the 11th day of September, 1909, be annulled, vacated, set aside and declared void, as having been made by the said R. Crawley Jones WITH THE INTENT TO PREFER THE SAID CLAUDE M. DEAN OVER HIS OTHER CREDITORS OF THE SAME CLASS." (Record, page 10.)

On October 14, 1912, the defendant, Claude M. Dean, filed his answer and said answer contains a full, complete and fair statement of all the facts in the case and of the transaction in question. (Record, page 47.) Thereupon the entire evidence in the case was taken before a NOTARY PUBLIC and filed in open Court on Feb. 15, 1913. (Record, page 58.)

An examination of the bill of complaint shows that the chief, if not the sole ground for claiming that the deed of trust in question is an unlawful preference, under Sec. 60b of the Bankruptcy Act, is that the loan was made on the 3rd day of September, 1909, whilst the deed of trust was not actually executed for a week afterwards.

The District Court ruled on this point as follows:

"With regard to the first question, the Court holds that on the 3rd of September, 1909, Claude M. Dean *was not a creditor* of the bankrupt, R. Crawley Jones. On that day he advanced for the bankrupt, R. Crawley Jones, the sum of $1,600.00 in pursuance and on the faith of an agreement on the part of R. Crawley Jones to give him a mortgage upon all his property to secure re-payment. This was a present valuable consideration, and the mortgage, although actually executed a few days subsequent, was executed in pursuance of a direct promise made in consideration of a present actual sufficient valuable consideration, and upon which the same was based, and was executed under circumstances so nearly in point of time as to be practically contemporaneous with the loan, and in the opinion of

this Court it is, therefore, not a mortgage given by way of preference to a pre-existing creditor so far as Claude M. Dean is concerned, but a mortgage given for a present actual valuable consideration." (Record, page 34.)

From this part of the decision of the District Court the trustee, the appellee in the Circuit Court of Appeals, did not ask for or take a cross-appeal, and by omitting to do so, we respectfully contend, he admits the correctness of the decision and the case stood in the Circuit Court of Appeals the same as if the alleged error had been waived at the hearing. *Loudon* v. *Taxing District*, 104 U. S., at page 774; *Field* v. *Barber Asphalt Co.*, 194 U. S., page 621, and cases cited.

DECISION OF THE DISTRICT COURT.

As the opinion of the Circuit Court of Appeals, on page 139 of the record, so clearly and concisely states what the decision of the District Court in this matter is, we shall adopt the same *in toto*, which is as follows:

"The District Judge held first, that Dean was not a creditor when the trust deed was executed, but, on the contrary, took the trust deed as security for money lent at the time, and that, therefore, the deed of trust could not be annulled as a preference given to an existing creditor under Section 60b of the Bankruptcy Statute; and, second, that while Dean had no moral obliquity, yet that when he accepted the deed of trust he had reasonable cause to believe that Jones was insolvent, and that its effect would be to defeat the provisions of the Bankrupt Law, and on this ground adjudged the deed of trust fraudulent under Section 67e of the act." (Record, page 139.)

An appeal was duly taken to the United States Circuit Court of Appeals for the Fourth Circuit by the defendant, Claude M. Dean, from that part of the decision

of the District Court adjudging "the deed of trust" given to him by the said bankrupt "fraudulent under Section 67e of the Bankrupt act;" but no cross-appeal was taken by the trustee from that part of the decision of the District Court adjudging that the said "Dean was not a creditor when the deed of trust was executed, but, on the contrary, took the trust deed as security for money lent at the time, and that, therefore, the deed of trust could not be annulled as a preference given to an existing creditor under Section 60b of the Bankrupt Statute."

The Circuit Court of Appeals in its opinion (Record, p. 138) held that the deed of trust in question was invalid, both under Sec. 60b and Sec. 67e of the Bankruptcy Act. The Senior Circuit Judge, presiding, only concurred in the result.

While the decision of the Circuit Court of Appeals affirms the decision of the District Court, yet in effect it only affirms it in so far as it held that the deed of trust in question was fraudulent under Sec. 67e of the Bankruptcy Act, and reversed the decision of the said District Court in so far as it held "that Dean, the appellant here, was NOT A CREDITOR (of the bankrupt) when the trust deed was executed, but, on the contrary, took the trust deed as security for money lent at the time, and that, therefore, the deed of trust could not be annulled as a preference given to an existing creditor under Section 60b of the Bankrupt Statute." (2nd Paragraph opinion Circuit Court of Appeals. Record, p. 139.)

From the decision of the Circuit Court of Appeals for the Fourth Circuit an appeal was sued out to this Court—said appeal being taken previous to the Act of January 28, 1915.

SPECIFICATION OF ERRORS.

The grounds on which the appellant insists that the decree appealed from is erroneous are set forth in the assignment of errors beginning on page 173 of the record, which assignment of errors for brevity, so as to not encumber this brief unnecessarily, are put in the form of nine questions, as follows:

THE NINE QUESTIONS INVOLVED IN THE CASE FOR DETERMINATION ARE:

FIRST. Whether or not the Circuit Court of Appeals erred in not reversing the order of the District Court overruling the demurrer filed by the appellant to the bill of complaint in the cause?

(*This question is covered by assignment of error No. 1.*)

SECOND. Whether or not the Circuit Court of Appeals erred in affirming the holding of the District Court that the bankrupt R. Crawley Jones, was insolvent on the 1st day of September, 1909, and that Claude M. Dean at the time he advanced the money had reasonable cause to believe the said Jones insolvent?

(*This question is covered by assignment of errors Nos. 8, 9, 10, 13, 14, 17 and 18.*)

THIRD. Whether or not the Circuit Court of Appeals had the right to hold the deed of trust in question invalid as a preference under Sec. 60b of the Bankruptcy Act, after said District Court having held that Dean was NOT a creditor of the bankrupt and that the deed of trust was given to Dean as a security for money lent at the time, and from which decision, which was adverse to the appellees, they failed to take a cross appeal?

(*This question is covered by assignment of errors Nos. 3 and 7.*)

FOURTH. Assuming that the Circuit Court of Appeals had a right to decide the preceding third question, although no cross-appeal was taken by the appellees, whether or not its decision holding that the deed of trust in question is void under Sec. 60b of the Bankruptcy Act is erroneous?

(*This question is covered by assignment of errors Nos. 3, 5, 6, 7, 9, 10 and 15.*)

FIFTH. Whether or not the Circuit Court of Appeals erred in affirming the decree of the District Court setting aside the deed of trust in question under Sec. 67e of the Bankruptcy Act, as having been given with the intent and purpose on the part of the bankrupt to hinder, delay or defraud his creditors?

(*This question is covered by assignment of errors Nos. 2, 4, 12, 16, 19, 20 and 21.*)

SIXTH. Whether or not the Circuit Court of Appeals decision in this cause is erroneous in holding that the deed of trust in question is void under Sec. 67e of the Bankruptcy Act, in that the complaint filed in the cause does not pray for any relief under this section of the Act, and even assuming that it does, whether or not said decision is still erroneous in holding that the deed of trust in question, under the circumstances and facts in this case, is invalid under said Sec. 67e?

(*This question is covered by assignment of errors Nos. 2, 4, 5, 6, 7, 9, 10, 11, 12 and 15.*)

SEVENTH. Whether or not the Circuit Court of Appeals erred in holding that "But Dean has much

more to overcome than mere knowledge that the money was lent to be used to pay an existing debt. Charged with notice of the insolvency of the debtor, *his purpose was to extricate Jones from embarrassment by acting with and for him in preferring a pressing debt.* In pursuance of this purpose, as agent for the debtor and in his behalf he actively participated in satisfying the pressing creditor, and taking up the pressing debt by means of the secured debt to himself. Even if the banks' notes had been marked paid, the whole transaction showed on its face that there was not that novation that the bankrupt statute contemplates as necessary to the protection of a lender. Looking away from the form to the substance, by his participation as agent of the insolvent debtor in paying the bank and taking up the notes and securing the debt, Dean tied himself to the old debt, and the notes given him must be regarded mere substitution of new papers for the old?"

(*This question is covered by assignment of error No. 10.*)

EIGHTH. Whether or not the Circuit Court of Appeals erred in holding that "The reason is still stronger for holding it (the deed of trust in question) invalid when the lender acts as agent of the debtor with the distinct purpose of aiding him to prefer a particular debt for his (the bankrupt's) own benefit?"

(*This question is covered by assignment of error No. 11.*)

NINTH. Whether or not a deed of trust, given by one merely charged with a crime, to secure a present loan, the proceeds of which are to be used in paying certain of his debts to extricate himself from the embarrassment of the charge, is valid under the bankruptcy act,

even though the grantor is insolvent, and the lender knows that the money he is loaning is to be so used?

(*This question is covered by assignment of errors Nos. 9, 10, 11, 12, 13, 14, 16, 18, 19, 20 and 21.*)

The foregoing questions will be discussed in their numerical order.

BRIEF OF THE ARGUMENT.

FIRST QUESTION.

Whether or not the Circuit Court of Appeals erred in not reversing the order of the district court overruling the demurrer filed by the appellant to the bill of complaint?

THE DEMURRER SHOULD HAVE BEEN SUSTAINED.

A demurrer to the bill of complaint was filed by the defendant, Claude M. Dean. The bill set out only one ground for setting aside the deed of trust of September 3, 1909. That was that it had been given by Jones with intent to *prefer* Dean over his other creditors of the same class. The prayer of the bill was that the deed for that reason might be set aside and declared void. The main ground for alleging this deed of trust to be an unlawful preference, as we have already pointed out, was that it was given about a week after the loan was made. Hence it was claimed that Dean was a pre-existing creditor, and that the deed was an unlawful preference. As originally made in the bill, this charge seemed to be true. But by agreement of counsel certain evidence contained in the record on appeal from the order adjudicating R. Crawley Jones a bankrupt, was filed as an exhibit with the bill. This evidence showed that whilst the deed of trust was given subsequent to the loaning of the Sixteen hundred

($1,600.00) dollars in cash, yet the same was given in pursuance of the promise or agreement contained in Jones' letter, dated September 1, 1909, and that it was only because of this promise that Dean was induced to make the advancement. The deed of trust having been made in pursuance of his agreement, entered into at the time the consideration passed, which was executed under circumstances so nearly in point of time as to be practically contemporaneous with the loan, made the security as valid as if the conveyance had been made simultaneous with the granting of the loan, and the District Court held to this effect. (Record, p. 34.)

The only ground of attack contained in the bill of complaint having thus been overruled, it would seem that there was nothing to do but to sustain the demurrer. There was no allegation in the bill that the deed of trust was not given or accepted in good faith, nor was it charged to have been made in fraud of the Bankrupt Act, nor did the special prayer of the bill seek relief upon those grounds. But despite the absence of these necessary allegations, the District Court held that the lien of this deed of trust had not been given or accepted in good faith, but that the same was made in contemplation of and in fraud of the bankrupt law, and held the deed of trust fraudulent under Sec. 67e of the Bankrupt Act. (See paragraph 2 of opinion, U. S. Cir. Court of Appeals, Record, p. 139.) It further held that, even though these allegations were absent, yet the bill showed sufficient facts from which it could be deduced that it was given and accepted in fraud of the bankrupt law; that the relief prayed for on this ground would be granted under the general prayer, though no such relief was specially asked for.

But we respectfully submit, that neither the facts set out in the bill nor the prayer thereof justified the

overruling of the demurrer. There is no allegation of fraud contained in the bill, nor was there any attempt to have the deed of trust set aside under Sec. 67e, of the Bankruptcy Act, as having been given by the bankrupt *with intent and purpose on his part to hinder, delay or defraud his creditors, or any of them,* nor is there any allegation in the bill that the deed in question is one that should be held null and void as against the creditors of the bankrupt under the laws of this State. And finally there is no allegation or facts contained in the bill of complaint as amended by the exhibit filed therewith, which justifies the claim that this deed of trust was not accepted in good faith, but in fraud of the act.

There being no such allegations, and the only specific prayer being to have the deed set aside as an unlawful preference, the Circuit Court of Appeals should have reversed the lower court and remanded the cause with directions that the demurrer should be sustained. Though the bill also contained a prayer for general relief, *the Court can only grant such relief thereunder as is consistent with the case made by the bill, and also consistent with the relief specially prayed for.* No such case, as we have pointed out, is contained in the bill of complaint. The relief there prayed for was to have the deed of trust set aside as an unlawful preference, whilst the relief that was sought to be granted by the lower court, was the setting aside of the deed on the ground that it was fraudulent; the relief is plainly inconsistent with the relief prayed for.

Woolfolk v. *Groves*, 113 Va., page 182, 195 and 196; 1 Barton Ch. Pr. (Ed. 1881), page 216; 3 A. & E. Encyp. of Pl. & Pr., page 350 and note 3; 16 *Id.*, page 804; *Warren* v. *Moody*, 122 U. S., 137-138.

The demurrer, therefore, should have been sustained, and the Circuit Court of Appeals erred in not so directing.

PLAINTIFF CANNOT PLEAD ONE CAUSE OF ACTION AND RECOVER ON ANOTHER.

"The fundamental rule is that the judgment shall be *secundum allegata et probata* and any departure from that rule is said to produce surprise, confusion and injustice. Pleadings and a distinct issue are essential in every system of jurisprudence and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. *Brighton* v. *Claflin Co.*, 180 N. Y., 76; *Ambromovitz* v. *Markowitz*, 58 Misc., 231; 108 Supp., 1044. No judgment can be given in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings or evidence. *Tuthill* v. *Myrus*, 57 App. Div., 37; 68 Supp., 37."

Bradbury's Rules of Practice, p. 194, Sec. 3.

IF OBJECTION IS MADE A MATERIAL VARIANCE IS FATAL.

"A plaintiff having failed to prove the cause of action set up in the complaint and proper objections having been made on the trial, and no amendment of the pleadings having been asked for, a judgment in plaintiff's favor on a cause of action not alleged cannot be sustained on appeal. *Ambromovitz* v. *Markowitz*, 58 Misc., 231; 108 Supp., 1044; *Northam* v. *Dutchess County Mutual Insurance Co.*, 177 N. Y., 73; *Korn* v. *Weir*, 88 Supp., 976."

Bradbury's Rules of Practice, p. 195, Sec. 5.

"A complaint in an action by a trustee in bankruptcy, to set aside a transfer made by the bankrupt, on the allegation that it was made in fraud of creditors and violated Sec. 60 of the Bankruptcy Act, a recovery cannot be had where it appears upon the trial that the transaction was made by reason of fraud practiced upon the bankrupt, and that the action should be founded on Sec. 70 of the Bankruptcy Act, as the variance is fatal. *Stern* v. *Mayer*, 133 App. Div., 181; 98 Supp., 1028. In an action to set aside a conveyance as fraudulent the court is not authorized to make a finding that the conveyance was not fraudulent, but was intended as a mortgage where facts are not set forth in the complaint authorizing such a judgment, nor does the complaint contain any demand for such relief. *Truesdale* v. *Sarles*, 104 N. Y., 164."

Bradbury's Rules of Practice, p. 201.

"Under a complaint in an action by a trustee in bankruptcy, to set aside a transfer made by the bankrupt, on the allegation that it was made in fraud of creditors and violated §60 of the Bankruptcy Act, a recovery cannot be had where it appears upon the trial that the transaction was made by reason of fraud practiced upon the bankrupt and that the action should be founded on §70 of the Bankruptcy Act, as the variance is fatal. *Stern* v. *Mayer*, 113 App. Div. (N. Y.), 181; 98 Supp., 1028."

"In an action to set aside a conveyance as fraudulent the Court is not authorized to make a finding that the conveyance was not fraudulent, but was intended as a mortgage where facts are not set forth in the complaint authorizing such a judgment, nor does the complaint contain any demand for such relief. *Truesdale* v. *Sarles*, 104 N. Y., 164."

Bradbury's Rules of Pleading, p. 201.

SECOND QUESTION.

Whether or not the Circuit Court of Appeals erred in affirming the holding of the district court that the bankrupt, R. Crawley Jones, was insolvent on the 1st day of September, 1909, and that Claude M. Dean at the time he advanced the money had a reasonable cause to believe the said Jones insolvent?

We respectfully submit that at the time of the giving of the deed of trust in question Jones was not insolvent, and even if he was, it has not been shown that Dean had reasonable cause to believe him insolvent.

The learned District Judge admits that both of these facts must be established by the trustee in bankruptcy in order to set aside the deed of trust given for a present consideration.

On September 1, 1909, R. Crawley Jones, the bankrupt, was engaged in two lines of business at or near Darvills, in the County of Dinwiddie, in the State of Virginia. He was carrying on farming operations, and at the same time had a store for general merchandise, where a large business had been conducted for many years by Jones and his predecessors. He had every appearance of prosperity and enjoyed unusual credit, and a reputation for business success. Record, p. 102.

Claude M. Dean was his brother-in-law, and although he had never been to his place, had heard from various sources of Jones' standing and prosperity. Dean had no knowledge of either farming or mercantile pursuits, but lived in the City of Richmond, where he was the Deputy Clerk of one of the Courts. On the previously mentioned date Jones wrote his brother-in-law that he was in pressing need of Sixteen hundred ($1,600.00) dollars in cash. He stated he was in serious trouble,

being charged with a grave offense. Even though he could prove himself innocent, yet there would always be the disgrace to his wife and child of his arrrest on such a charge. He stated in his letter that he had enough to more than pay Dean five times over the amount asked for. He enclosed notes for Sixteen hundred ($1,600) dollars, and stated he would secure them by a proper deed of trust on everything he possessed as soon as Dean could prepare the same. That all he needed was a little time when he would repay the amount loaned. Record, p. 32.

At that time the Virginia National Bank, one of the banks in the City of Petersburg, held three notes of Jones', one for Six hundred and fifty ($650.00) dollars, one for Six hundred ($600.00) dollars, and a third for something like Six hundred ($600.00) dollars. Record, p. 66 and 67.

Concerning the genuineness of one of the signatures on these notes some question had been raised. According to the testimony of the Cashier of the Virginia National Bank, this was a *mere rumor* and he or the officers of the bank had sought to prevent its spread. The bank, however, had demanded payment of all three of these notes. Record, p. 103 and 104. This was the occasion of the writing of the above described letter by R. Crawley Jones to his brother-in-law Dean. The letter was brought by the father of the bankrupt, J. Samuel Jones. In answer to Dean's inquiry, the latter stated that his son's financial condition was very good and that he was loaning him Five hundred ($500) dollars without any security. He said, that both at the store and on the farm his son was doing a good business. He estimated his corn crop to be worth Five or Six hundred dollars, and his tobacco crop to be worth Three or Four hundred dollars. His son was building a new dwelling

house by day labor and this had taken a great deal of cash money, and therefore, he needed ready cash with which to take up the above mentioned notes, and thus relieve himself of any chance of embarrassment. He further stated that his son would be able then to carry on his farming and his business, and would return the money to Dean. Record, p. 101.

Dean had confidence in J. Samuel Jones, a confidence which the record shows was shared by everyone. Believing implicitly in the accuracy of the foregoing staements, Dean told J. Samuel Jones that he did not have as much as Sixteen hundred ($1,600) dollars, but would secure the same the next day. He directed Jones to stop at the banks in Petersburg and see if payment at that time would be alright. Jones did so, and wired Dean to meet him in Petersburg the next day, and that the matter could be arranged. This telegram was prepared by the Cashier of the Virginia National Bank. Record, pp. 18 and 24 and 102.

The Cashier of the bank was J. W. Long. In order to have the assurances given him by J. Samuel Jones corroborated, Dean called on Cashier Long with a view of accurately ascertaining the financial situation of R. Crawley Jones. Record, p. 103.

This was particularly necessary, as Dean had to borrow the money and could not afford to loan it to the bankrupt, however urgent his need, except upon good security. "If I had thought for a moment that I was not receiving good security, I would not have made the loan." Record, p. 103. Cashier Long confirmed the statements as to Jones' solvency which had already been made to Dean by J. Samuel Jones.

As to the exact facts and views of Jones' financial condition furnished him by Cashier Long, Dean's recol-

lection was very clear and his testimony strong and positive. He gave his testimony on this point a short time after the conversation had taken place, that is at the hearing on the petition for adjudication filed by Jones' creditors. On the other hand, J. W. Long was not called on to testify until almost four years after the conversation took place. His recollection, to say the least, was very hazy, and he did not attempt to contradict or deny Dean's account of what took place, but contented himself with simply saying "I don't recollect;" "I don't remember. I am not positive." Record, p. 62, 63, 64, 65, 67 and 68.

There could have been no better source of information to which Dean could apply, and certainly no one has pointed out any better source for learning the condition of Jones' finances and business than the Cashier of the bank at which Jones dealt.

Some criticsm is attempted, however, to be offered because Dean did not make an examination of Jones' books. In the first place those who know how the books of a country merchant are usually kept, also know how little information can be obtained from them. Even in the bill where this charge is made, it is not pretended that such an examination would have disclosed the fact of Jones' insolvency, or would have shown anything, except that he was indebted on various mercantile accounts. And finally as Dean himself testifies, Dean had no expert knowledge of such books and could have gained little or no information from them. There was no mercantile agency to which Dean could apply in order to ascertain R. Crawley Jones' financial standing. The best source of information, therefore, was the Cashier of the bank at which Jones dealt. He not only had the usual source of information possessed by such institutions regarding the financial ability of their customers, but five members of the board of directors of this bank

were five of the largest creditors of R. Crawley Jones. Record, p. 71 and 104. Cashier Long had discussed with his directors the rumor regarding the genuineness of one of the signatures on these notes. Record, p. 104. He had also made a trip to the home of the bankrupt's father to investigate the affairs of R. Crawley Jones, and to arrange for the payment of these notes. Long testifies that whilst at that time there was some rumor around town that Jones had been over trading, he had heard nothing definite against his financial condition and did not know at that time that R. Crawley Jones was insolvent. Record, p. 63 and 94. He also told Dean that he had investigated and was of the opinion that Jones had plenty to pay everybody. Record, p. 103.

In this way Dean had exhausted every available means for ascertaining whether or not R. Crawley Jones was insolvent, and his ability to go on with his business, provided he received this temporary aid. No other source has ever been suggested from which information on these points could have been obtained, except the examination by Dean of Jones' books, the futility of which we have already pointed out. If this expert bank officer, J. W. Long, who had visited the father of R. Crawley Jones, and like Dean, had received assurances of his son's financial ability, did not know or have reasonable ground to believe that Jones was insolvent, but, on the contrary, stated that he had plenty to pay everybody, then how can knowledge of or reasonable ground to believe in Jones' alleged insolvency be imputed to Claude M. Dean?

With the assurances, thus above set forth, of the bankrupt himself, of his honest old father, and of Cashier J. W. Long, as to Jones' financial condition being good, and that he was not in any sense insolvent, appellant borrowed the Sixteen hundred ($1,600.00) dol-

lars on his personal note and loaned the same to R. Crawley Jones. Record, p. 103.

In his bill of complaint the trustee alleges and admits that the banks did not know or have reason to believe at the time these notes were paid, that R. Crawley Jones was insolvent. What reason then can be given for claiming that at that time Dean knew or had reason to believe Jones to be insolvent? The banks knew all the facts about Jones' monetary condition, including the rumor that one of the endorsements on the notes was forged. Five of their directors were among Jones' largest creditors. If the banks, despite this knowledge, did not have reasonable ground to believe Jones to be insolvent, the same is yet more true of Dean. Record, p. 94 and 104 and 112.

With the Sixteen hundred ($1,600.00) dollars, and some Six hundred ($600.00) dollars more advanced by J. Samuel Jones, the latter paid the notes held by the Virginia National Bank, and those held at one other bank. By direction of R. Crawley Jones, he turned over these notes to Dean, so that he could possess evidence that the money advanced by him had been applied to a reduction of the indebtedness of R. Crawley Jones. Record, p. 121.

If Dean, as we have seen, was justified at the time of making the loan in believing that R. Crawley Jones only needed a little ready cash to extricate himself much more was he entitled to believe in the solvency of R. Crawley Jones when he went to Darvills to have his deed of trust signed and executed. If any suspicion of the ability to pay his debts on the part of R. Crawley Jones lingered in the mind of Dean, after his interview with the cashier it was entirely dissipated when he saw the apparent prosperity existing both on the farm and at the store of Jones. Jones stated to him that he would make about One hundred barrels of corn, which would

bring in about Five or Six hundred dollars; that his tobacco crop would bring between Three and Four hundred dollars; that his farm was very valuable and he considered it worth between forty-five hundred ($4,500.00) and Five thousand ($5,000.00) dollars. Record, p. 105. He also called Dean's attention to his live stock, and Dean also saw the comfortable character of his house and his general air of prosperity. All of this confirmed Dean in the conviction that the statements made to him by Long, the Cashier, and by the father of R. Crawley Jones as to the financial condition of the latter, were true.

On this occasion he learned for the first time that there was a deed of trust on the farm for Three thousand ($3,000.00) dollars. Jones, however, insisted that his equity in the farm was worth at least Fifteen hundred $1,500.00) dollars. In this belief Dean himself united, and it was later on confirmed by Cleveland Wright, one of Jones' creditors, who stated to Dean that he believed the farm was worth about Five thousand ($5,000.00), and that he intended to buy it in at a reasonable figure, for he knew the value of it, and in this way if he did not get the money due him he would make it out of a re-sale of the farm. (Record, p. 105 and 106.)

The balance of the purchase price of the farm was represented by long term notes, having three, four and five years to run. Jones only had to pay the annual interest on these notes, and it would be several years yet before the first principal note fell due.

Much is made out of the fact that the deed of trust given Dean covered practically all of the property of R. Crawley Jones, and being so excessive as to raise a presumption of fraud. Indeed, Jones himself raised the question as to the necessity of including all these

things in the deed. The burden of proving this charge was on the trustee, and we submit that Dean's explanation fully answers this objection. It was necessary, in order to conform to the terms of Jones' letter to Dean, dated September 1, 1909. The deed of trust, subsequently given to secure said loan, could only be held valid when shown to have been made in conformity with the specific promise, which was the inducement for making said loan. 1 Loveland on Bankruptcy (Ed. 1912), page 952. If Dean had attempted to vary this promise in any way, these creditors would have been the first to have claimed that on that ground the deed of trust must be held invalid, as not in accordance with the specific security promised. Besides the deed was a mere security and everything after the $1,600 had been realized would revert back to Jones.

The foregoing establishes conclusively, we submit that Dean did not know at the time he loaned the Sixteen hundred ($1,600.00) dollars, that R. Crawley Jones was insolvent, nor did he have reasonable ground to believe that said Jones was insolvent.

The Supreme Court in the case of *Grant* v. *National Bank*, 97 U. S. 80, said:

> "Some confusion exists in the cases as to the meaning of the phrase, 'having a reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assume that it has the same meaning as if it had read: 'having reasonable cause to suspect such a person insolvent.' But the two phrases are distinct in reason and effect. It is not enough that a creditor has some cause to suspect the insolvency of a debtor; but he must have such knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the

intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim and have strong desire to secure it, and yet such belief as the Act required may be wanting. Obtaining additional security or receiving payment of the debt, under such circumstances, is not prohibited by the law. * * * * * *

"The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided. * * *

"It cannot be denied that the officers of the bank had become distrustful of Miller's ability to bring his affairs to a successful termination, and yet it is equally apparent, independent of their sworn statements on the subject, that they supposed that there was a possibility of his doing so * * * * * Without going into the evidence in detail, it seems to us that it only establishes the fact that the officers had reason to be suspicious of the bankrupt's insolvency when their security was obtained, but that it falls short of establishing that they had reasonable cause to believe that he was insolvent."

Speaking of the above case, the Supreme Court said, in *Stuckey* v. *Savings Bank*, 108 U. S., 74:

"That case established the doctrine that a creditor, dealing with a debtor, whom he may suspect to be in failing circumstances, of which he has no

sufficient evidence, may receive payment or security without violating the bankrupt law."

Judge Connor applies the rule laid down in *Grant* v. *Bank, supra,* in case of *In re Carlile,* 29 Am. Bank Rep., p. 373-382.

Applying the doctrine laid down in the above cases to the case at bar, can it be seriously contended that Dean had more than a mere suspicion of Jones' insolvency, if even that?

The burden of proving this alleged insolvency of Jones, if a material fact, rested upon the trustee of the bankrupt.

Calhoun City Bank v. *Cain,* 152 Fed., 983.

Yet we submit that there is no evidence, and certainly no conclusive evidence, in this record that R. Crawley Jones was insolvent on September 3, 1909, the date of the making of the loan. It is true Jones has been adjudged insolvent as of the 24th day of December, 1909, the day of the filing by his creditors of a petition of involuntary bankruptcy. But this transaction of the loan took place several months before this date. The action of the creditors in filing their petition necessarily destroyed the value of the assets held by Jones, and of course his business would no longer be a going concern. Yet from a fair valuation it would seem that in September, 1909, Jones was not insolvent, and that if he had been allowed to continue his business in the usual way he might have paid off his indebtedness in the ordinary course of business as it fell due. Record, p. 77 and 78; Record, p. 23 and 110. The account stands as follows:

List of Assets of R. Crawley Jones as disclosed by the Testimony in this Case.

1. Farm of 201 acres and buildings thereon. This value Dean bases on information he obtained from the bankrupt and Cleveland Wright, one of Jones' largest creditors, and a member of the Board of Directors of the Virginia Nat'l Bank and a member of the Committee of the creditors of Jones. Record p. 105-106.	$5,000.
2. Stock of good in store. Well's testimony. Record p. 77 & 78. Dean's testimony. Record p. 110. (These goods inventoried at $2,607.76). Record p. 76.	3,000.
3. Accounts due R. C. Jones. Well's testimony. Record p. 27 and Bill of Complaint. Record p. 8. Dean's testimony. Record p. 112.	500.
4. Personal property on farm, such as live stock, farming implements, mules, wagons, harness, etc., which were sold by Quick, trustee for	534.25
5. Corn crop, tobacco crop and pea crop. Dean's testimony. Record p. 111.	1,000.
6. Household and kitchen furniture. Dean's testimony. Record p. 111.	800.
Total am't. of assets	$10,834.25

LIST OF LIABILITIES OF R. CRAWLEY JONES AS DISCLOSED BY TESTIMONY AND EXHIBITS IN THIS CASE.

1. Amount of provable debts filed in the case of R. Crawley Jones, involuntary bankrupt. Complainant's Exhibit B. C. S. "B" Record p. 83. By reference to this exhibit, it will be seen that the debt due R. E. Blakey for $2,250 is evidenced by 2 notes dated Feb. 20, 1909, and payable 1 & 2 years after date respectively, each for 1-2 of this amount. Record p. 83.	$5,394.08	
2. Amount due on farm. Quick's testimony, Record p. 59. Amt. due on farm is evidenced by 3 notes, dated Feb. 20, 1909, for $1,000 each, and payable 3, 4 and 5 years after date. Record p. 85.	$3,000	
Total amt. liabilities		8,394.08
The testimony therefore in this case conclusively shows Jones to have been solvent by		$2,440.17
Deducting therefrom amount of notes given Dean and secured by deed of trust		1,600.
The evidence still shows Jones to be solvent by		$840.17

ANOTHER ILLUSTRATION OF JONES' SOLVENCY.

Jones' solvency is even better illustrated by taking the amount of the provable debts filed against his estate before the Referee, viz:		$5,394.08
(Record page 83) and the amount owing on farm		3,000.00
(Record page 85), making his total liabilities		$8,394.08
and then deducting therefrom the amount owing on the farm, because no part thereof was or would become due for more than three years. Record p. 85).	$3,000	
and further deducting therefrom the amount owing to R. E. Blakey, because one-half of same would not be due for more than six months, and the other half would not be due for 18 months. (Record p. 83) this would cut down Jones' indebtedness at the time of the giving of the deed to	2,250	$5,250.00
		$3,144.08

Which amount could have easily been realized alone from the sale of the stock of merchandise in Jones' store, had he been permitted to dispose of said stock in the ordinary course of business, and W. P. Wells, the trustee, a witness for the complainants below (appellees here), so testified. Record, p. 77-8.

Moreover it was the duty of the trustee in bankruptcy to have placed Jones upon the stand so as to show what were his assets on September 3, 1909, or to have obtained this proof from other sources. It must be presumed that Jones was examined and his books of account were before the Referee as required by law. Although this evidence of Jones' financial condition was at hand, the complainant trustee has not seen fit to file the same in this case. It was material, perhaps the most material, evidence on the question of Jones' insolvency as of September 3, 1909, and the failure to introduce the same raises a fair presumption that Jones was not insolvent at that date.

DEAN DID NOT HAVE REASONABLE GROUND TO BELIEVE JONES INSOLVENT.

But even if Jones had been shown by the evidence in this case to be insolvent at that time, the clear preponderance of the evidence is to the effect that Dean had no reasonable ground to know of such insolvency. Yet the burden of proof was equally upon the trustee to show that Dean knew or had reasonable ground to believe Jones insolvent on September 3, 1909. The trustee has failed to establish either point and, therefore, the deed of trust must be held valid.

Calhoun City Bank v. *Cain*, 152 Fed., page 983. (C. C. A. 4th Ct.).

In re Carlile, 29 A. B. Rep., 373-380. (D. C. 4th Ct.)

On November 16, 1909, Jones furnished to Thomas, one of his creditors, a list of his debts and names of the parties to whom they were due. But this list does not show when these debts were contracted, whether before or after September 3, 1909. Jones furnished it with a view of satisfying his creditors of his solvency. The statement seems to have had this effect, as for more than a month thereafter his creditors took no action, as they would most likely have done, had they believed him to be insolvent.

THIRD QUESTION.

Whether or not the Circuit Court of Appeals had the right to hold the deed of trust in question invalid as a preference under Sec. 60B of the bankruptcy act, after the said district court having held that Dean was not a creditor of the bankrupt and that the deed of trust was given to Dean

(appellant here) as a security for money lent at the time, and from which decision, which was adverse to the appellees, they failed to take a cross-appeal?

It is the well settled ruling of this Honorable Court that an appeal brings up for review only that which was decided adversely to the appellant, and that a party not appealing cannot take advantage of an error committed by the lower court against him. If the appellees in this case had desired to avail themselves of the alleged error of the District Court in deciding adversely to them the question of preference under Sec. 60b of the Bankrupt Act, they should have taken a cross-appeal to the Circuit Court of Appeals. By omitting to do so, they admit the correctness of the decision of the District Court on this question as to them; and the case stood before the Circuit Court of Appeals the same as if the alleged error had been waived at the hearing. Therefore, the holding by the Circuit Court of Appeals that the deed of trust given to Dean, the appellant here, was void as a preference under Sec. 60b of the Bankruptcy Act, was an error, because that question was not before it, and its decision, therefore, on this point, should be reversed in the interests of the due administration of justice and the uniformity of decisions, and further because the Circuit Court of Appeals for the Fourth Circuit should have followed and observed this well established rule, which has been repeatedly affirmed and uniformly followed by this High Court for a half a century.

AUTHORITIES IN SUPPORT OF APPELLANT'S CONTENTION AS TO THIS QUESTION.

The following authorities are respectfully cited in support of appellant's contention that the question, as

to the deed of trust to your appellant being a preference under Sec. 60b, was not before the Circuit Court of Appeals for decision, and that it was error for it to pass upon same adversely to your appellant.

AUTHORITIES.

This Honorable Court, in the leading case on the question in point, in *Chittenden* v. *Brewster*, 2 Wall., page 195, said:

"It does not appear from the proofs in the case, that executions had been issued, and returned unsatisfied, as averred in the bill, and for the proof of which the answer of defendants called; and it is objected by the counsel for the *appellees* that this defect is fatal to the right of the complainants to maintain their bill. *This would be so, if the appellees*, against whom the decree was rendered, *had appealed from the same*, as in the case of *Jones* v. *Green*. See also *Day* v. *Washburn*. *But here the complainants only have appealed, and the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself.* * * * *If the appellees desired to avail themselves of this error in the decree they should have brought a CROSS APPEAL. By omitting to do so, they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing.*" (Italics ours.)

And this Court in the case of *Loudon* v. *Taxing District*, 104 U. S., on page 774, held:

"The city took an appeal from that part of the decree which gave the appellant affirmative relief; but that appeal has been dismissed, under the ninth rule, for want of prosecution. The case stands here now as though no such appeal has been taken. *The city can, therefore, only be heard in support of the decree as it stands. This has long been the settled rule in this court. Canter* v. *American and Ocean Insurance Companies,*

3 Pet., 307; *Chittenden* v. *Brewster*, 2 Wall., 191; *The Stephen Morgan*, 94 U. S., 599. *An appeal brings up for review only that which was decided adversely to appellant.* It is unnecessary to determine what might have been done in this case if the appeal of the city had not been formally dismissed for want of prosecution." (Italics ours.)

This Court in the case of *Bolles* v. *Outing Co.*, 175 U. S., page 268, cited with approval the foregoing cases, and held:

"Two other defences are interposed which go to the recovery of even the small judgment of one dollar and costs, and which, if sustained, would require the judgment of the court below to be reversed, and ultimately a verdict for the defendant. First, that the notice of the copyright, imprinted on the photograph, did not fill the requirements of the statute; and, second, that the copyright claimed by Bolles is not sanctioned by the Constitution. *It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below. Canter* v. *American, &c., Ins. Co.*, 3 Pet., 307, 318; *Chittenden* v. *Brewster*, 2 Wall., 191; *The Maria Martin*, 12 Wall., 31, 40; *The Stephen Morgan*, 94 U. S., 599; *Clark* v. *Killian*, 103 U. S., 766; *Loudon* v. *Taxing District*, 104 U. S., 771; *Cherokee Nation* v. *Blackfeather*, 155 U. S., 218." (Italics ours.)

The point in question was also decided by this Court in the case of *Mail Company* v. *Flanders*, 12 Wall., on pages 134 and 135, in which case it was held:

"Probably the decision in the matter of the steamer Iberville was placed upon the ground that the steamer was captured within our military lines subsequent to the publication of the proclamation issued by the commanding general at the headquarters of the army, announcing that 'all the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States.'

"Much difficulty, to say the least, would have arisen in sustaining that part of the decree *if the respondents had appealed to this court*, as the presiding justice held that the Circuit Court had no jurisdiction of the case, but inasmuch as that part of the decree was in favor of the appellants, and the respondents did not appeal, the error, if it be one, cannot be corrected. *Correction of the error is not sought by the appellants, and it is well settled law that no one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the subordinate court.* (*The Mary Ford*, 3 Dallas, 198.) *Appellees may be heard in support of the decree, but not for reversal, as it is the privilege of both parties to appeal if they see fit and comply with the conditions prescribed by law.*" Citing *The William Bagaley*, 5 Wall., 412; *Chittenden* v. *Brewster*, 2 Wall., 191; *Harrison* v. *Nixon*, 9 Pet., 484; *Stratton* v. *Jarvis*, 8 *Id.*, 4; *Buckingham* v. *McLean*, 13 How., 150; *Canter* v. *Am. Ins. Co.*, 3 Pet., 318. (Italics ours.)

The foregoing decision was cited with approval by this Court in the case of *Field* v. *Barber Asphalt Company*, 194 U. S., page 621, in the following language:

"If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. *If he fails to take such appeal the correctness of the decision as against him will be presumed.* *Mail Company* v. *Flanders*, 12 Wall., 130; *Chittenden* v. *Brewster*, 2 Wall., 191, 196."

And the rule has been diligently followed by the various Circuit Courts of Appeals.

Pauly Jail Bldg. & Mfg. Co. v. *Hemphill Co.*, 10 C. C. A., 600; *B. & L. Asso.* v. *Logan*, 14 C. C. A., 133-136.

See also:

Clark v. *Killian*, 103 U. S., 766, 769; *U. S.* v. *Blackfeather*, 155 U. S., 180-186.

No decisions in the federal courts in which this rule has been disregarded or doubted have rewarded a diligent search, and the rule has been repeatedly affirmed and uniformly followed for half a century.

Another very strong evidence that the Circuit Court of Appeals did not have before it the question of the deed of trust being given in violation of Sec. 60b, is that the appellees themselves did not even ask for such relief in their brief, nor was any such relief asked for at the oral argument in that Court, but on the contrary, counsel for appellees, in response to a question by one of the Judges presiding in the case made the positive statement at the bar of that court, that he relied entirely upon 67e in having the deed of trust set aside.

No such relief being asked for in the brief of the appellees or at the oral argument, and no cross-appeal having been taken from the ruling of the lower court under that section, we respectfully submit, for the Circuit Court of Appeals now to decide this case and hold the deed of trust in question void under Sec. 60b, was taking your appellant by surprise, and was a great injustice to him. We, therefore, respectfully contend that this court, in view of the fact that the decision of the Circuit Court of Appeals affirming the lower court is based almost entirely upon the fact that the giving of the said deed of trust is in violation of Sec. 60b, should reverse the decree appealed from.

If the appellees had any right to have the deed of trust in question set aside under §60b of the Bankruptcy Act in Circuit Court of Appeals, the same was waived by their failure to take a cross-appeal, and they should

not have been heard to complain of any adverse ruling thereon in the court below. and the Circuit Court of Appeals erred in so considering said question.

FOURTH QUESTION.

Assuming that the Circuit Court of Appeals had a right to decide the third question, although no cross-appeal was taken by the appellees, whether or not its decision in this cause is erroneous in holding that the deed of trust in question is void under Sec. 60b of the bankrupt act?

The reasons given by the Circuit Court of Appeals for holding the deed of trust void under Sec. 60b as an unlawful preference are set out in paragraphs 9 and 10 of its opinion, and appears on pages 141 and 142 of printed record.

With all deference and respect, we most seriously contend that the reasoning and the conclusions drawn therefrom of the Circuit Court of Appeals in holding the deed of trust invalid under Sec. 60b of the Bankrupt Act is unsound and erroneous in law, and is in conflict with the decisions of this Honorable Court and the different Circuit Courts of Appeals as pointed out herein.

It will be observed from a reading of these two paragraphs (9 and 10) of the opinion of the Circuit Court of Appeals, that it concedes that:

"It is true Dean lent the money at the time the mortgage was executed and the principle is settled by the Supreme Court in *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575, that the mere knowledge of a lender that the money borrowed is to be applied to an existing debt does not make the security given invalid under Sec. 60b as an unlawful preference or under 67e as a fraud."

And this should have been decisive of this case. However, this well established principle and rule of

law, as laid down by this Honorable Court, in the case of *Van Iderstine* v. *National Discount Co., supra,* the Circuit Court of Appeals refused to follow, because, as stated in its opinion, that Dean's "purpose was to extricate Jones (the bankrupt) from embarrassment by acting with and for him in preferring a pressing debt. In pursuance of this purpose, as agent for the debtor, and in his behalf, he actively participated in satisfying the pressing creditor, and taking up the pressing debt by means of the secured debt to himself. * * * Looking away from the form to the substance, by this participation as agent of the insolvent debtor in paying the bank and taking up the notes and securing the debt, Dean tied himself to the old debt, and the notes given to him must be regarded mere substitution of new papers for the old. Where in such a transaction the lender acts as agent for the creditor the security has been held invalid. (*There is no contention in this case that Dean acted as agent for the creditors who got the money he loaned Jones.*) *In re Beerman*, 112 Fed., 663; *Alexander* v. *Redmond*, 180 Fed. 92; *Walters* v. *Zimmermann*, 208 Fed., 62; *Van Iderstine* v. *National Discount Co.*, 227 U. S. 575. The reason is still stronger for holding it invalid *when the lender acts as agent of the debtor with the distinct purpose of aiding him to prefer a particular debt for his (the bankrupt) own benefit.* * * * The deed of trust o Dean must, therefore, be declared void under Section 60b as an unlawful preference." (Italics ours.)

We respectfully submit that there is no allegation in the bill and that there is no evidence or proof in the record in this case that Dean acted as or was the agent of Jones, the bankrupt, or that he participated as such for his benefit in carrying out the alleged plan of preference. Neither the complaint filed in this case, the record, nor the proofs therein justify the conclusion of law reached by the Circuit Court of Appeals that Dean by

his alleged participation as agent of the insolvent debtor in paying the bank and taking up the notes and securing the debt tied himself to the old debt, and that the notes given him must be regarded mere substitution of new papers for the old. There is no such allegation in the complaint, the record does not show such to be the fact, and the proof of the case shows conclusively to the contrary. It was a mere coincidence that Dean was present when the money he loaned the bankrupt was used by the bankrupt's father in paying the bankrupt's indebtedness at the bank. See Dean's uncontradicted testimony on page 107 of the record, answer to question 32. Also see the testimony of the appellee's star witness, J. W. Long, the cashier of the bank who received the money in payment of Jones' indebtedness to the bank, on page 92 of the record, his answers to questions 14 and 15. *Therefore, it is impossible, as it seems to the appellant, that the transaction can be converted from that which it was into something which it was not, in order to bring in the doctrine of a preference under Sec. 60b of the Bankruptcy Act.* (See *Ex Parte Stubbins*, 17 Chancery Division, pp. 67, 68 and 69.)

However, assuming for the sake of argument that Dean did act as the agent of the insolvent in paying the money to the bank for him, yet, if under the decisions of this Honorable Court, and the said Circuit Court of Appeals, a lender may know that the money he loans is to be used in paying a favored creditor or for making a preference, counsel for appellant is at a loss to know why a different inference is to be drawn from the lender's action, because, as the lower court says, he actually participated as the agent of the borrower in carrying out the plan of preference, when such a transaction in itself would have been lawful had the borrower acted for himself in the matter. This very Circuit Court of Appeals in the case of *Crim* v. *Woodford*, 136 Fed., 34, 40 and 41, held a similar transaction law-

ful. We, therefore, respectfully contend that it should have followed in deciding this case its own previous decision, and especially so, because the same is in harmony with the decisions of this Honorable Court in the cases of *Coder* v. *Arts*, 213 U. S., 223, and *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575; and likewise in harmony with the other Circuit Courts of Appeals and other courts, in the cases of *Githens* v. *Shiffler*, 112 Fed., 505, 507; *In re Hersey*, 171 Fed., 1001; *George* v. *Grant*, [illegible]m. (N. Y.), 69, which was affirmed in 97 N. Y., 270; and *In re Baar* (C. C. A., 2nd Ct.), 213 Fed., 629-30, recently decided.

This latter case is on all fours with the case at bar, and for this reason we make the following extended extract therefrom:

"The mortgage was valid under the law of the State of New York against creditors, because it was duly filed in accordance with article 10 of the Lien law (Consol. Laws, N. Y., c. 33). As such it is good against the trustee in bankruptcy under Section 67 (d) of the Bankruptcy Act, unless it was not accepted in good faith or was in fraud of the act. It could not be set aside under section 67 (e) unless it was given and accepted with the intent of hindering, delaying and defrauding creditors. Solomon Baar gave a full present consideration. If he knew or even stipulated that part of the proceeds of the loan should be applied to relieve the corporation of which he was president and his nephew of liability as accommodation indorsers on the bankrupt's notes, there was nothing fraudulent in that. The payment was a preference of the banks, and so of the indorsers; but the bankrupt had at common law and under the statute of Elizabeth a right to prefer any *bona fide* creditor. The trustee could recover the payments under section 60, if the banks receiving them had reasonable cause to believe that they were intended as preferences; but to invalidate the mortgage under Section 67 (e) as a preference is not sufficient. *Actual fraud on the bankrupt's part must be shown. Van Iderstine* v. *National Discount*

Co., 174 Fed., 518, 98 C. C. A., 300; *Coder* v. *Arts*, 213 U. S., 223, 241, 29 Sup. Ct., 436, 53 L. Ed., 772, 16 Am. Cas., 1008.

"No such fraud being shown, the order is reversed."

CREDITORS ONLY MAY BE PREFERRED.

Under Secs. 60a and 60b.

The Circuit Court of Appeals has inadvertently overlooked the fact that in order to constitute a preference, a transfer must be made to a CREDITOR or to some one on his behalf, and this inadvertence is well evidenced by the reason it gives in the tenth paragraph of its opinion for holding the deed of trust in question invalid under Sec. 60b as a preference. We here quote from that part of that opinion, as follows:

"Where in such a transaction the lender acts as agent for the CREDITOR the security has been held invalid. *In re Beerman*, 112 Fed., 663; *Alexander* v. *Redmond*, 180 Fed., 92; *Walters* v. *Zimmerman*, 208 Fed., 62; *Van Iderstine* v. *National Discount Co., supra. The reasoning is still stronger for holding it invalid when the lender acts as the agent of the debtor with the distinct purpose of aiding him to prefer a particular debt for his (the bankrupt) own benefit.*" (Italics ours.)

We respectfully concede the law to be as stated in the first sentence of the preceding paragraph, but we most seriously contend that the law laid down and the reasoning given therefor in the second sentence of the preceding paragraph is erroneous and unsound, as the indispensable pre-requisite of a preference is lacking, viz., a pre-existing creditor. Therefore, there could have been no intent to prefer Dean, nor can there be any recovery from Dean under 60b of the Bankruptcy Act.

"Though the words 'person' and 'creditor' are used interchangeably in this subsection, it is clear that only a creditor can receive a preference. A payment for transfer to anyone other than a creditor, *unless for the latter's benefit*, falls within the remedies indicated in Secs. 67e and 70e. * * * The practitioner, therefore, should at the outset of a suit to recover decide whether the proposed defendant is a creditor or not. Pleading, proof and possibly judgment will depend upon such decision." *Collier on Bankruptcy*, 10th Edition, page 813.

Conceding for the sake of argument, that Dean did act as the agent of the bankrupt with the distinct purpose of aiding him to prefer a particular debt for the bankrupt's own benefit, as stated by the Circuit Court of Appeals, yet this would not make Dean a creditor, and as it is elementary that a transfer can never be a preference unless it is made in consideration of an antecedent debt, the Circuit Court of Appeals erred in holding to the contrary and has, therefore, caused great injustice to your appellant, and in so holding it has caused a contrariety of decisions in this country and England, and therefore its decree should be reversed.

THE DISTRICT COURT HELD THAT DEAN WAS NOT A CREDITOR.

As will appear on page 34 of the record, the District Court ruled that Dean was not a creditor of the bankrupt, R. Crawley Jones, in the following language:

"With regard to the first question, the Court holds that on the 3rd of September, 1909, Claude M. Dean was not a creditor of the bankrupt, R. Crawley Jones. On that day he advanced for the bankrupt, R. Crawley Jones, the sum of $1,600.00 in pursuance and on the faith of an agreement on the part of R. Crawley Jones to give him a mortgage upon all his property to secure re-payment. This was a present valuable consid-

eration, and the mortgage, although actually executed a few days subsequent, was executed in pursuance of a direct promise made in consideration of a present actual sufficient valuable consideration, and upon which the same was based, and was executed under circumstances so nearly in point of time as to be practically contemporaneous with the loan, and in the opinion of this Court it is, therefore, not a mortgage given by way of preference to a pre-existing creditor so far as Claude M. Dean is concerned, but a mortgage given for a present actual valuable consideration." (Record, page 34.)

This ruling of the District Court is ably supported by the following authorities:

"Mortgages have been sustained when given in pursuance of a valid promise made at the time of the loan, where it was shown that the promise was to give specific security and that the promise was given as an inducement upon which the loan was made."

Loveland on Bankruptcy (4th Ed.), p. 952, citing:
In re Jackson Iron Mfg. Co., Fed. Cases No. 7153.
Brudock v. *Jackson*, 15 N. B. R., 318.
Douglass v. *Vogeler*, 6 Fed., 52.
Gattman v. *Honea*, Fed. Cases, No. 5271.
Sabin v. *Camp*, 98 Fed., 974, approved in
Thompson v. *Fairbanks*, 196 U. S., 525.

And the following cases are to the same effect:
Sexton v. *Kessler & Co.*, 172 Fed., 535, 542-5.
Hauslet v. *Harrison*, 105 U. S., 401.
Goodnough M. & S. Co. v. *Galloway*, 156 Fed., 504-510.
In re Wolf, 98 Fed. 84.
Walker v. *Brown*, 165 U. S., 654, 664-5.
Goodnough M. & S. Co. v. *Galloway*, 171 Fed., 940-949.

Judge Boyd, speaking for the Circuit Court of Ap-

peals for this circuit in the case of *Davis* v. *Turner*, 120 Fed., 605, said:

"This would seem to settle the point in question. The previous Bankrupt Act contained, substantially, a provision similar to that in the present law relative to the transfer of property in order to prefer a creditor; but it did not make any exception for transactions based upon present consideration; and yet under that act it was held that, where the debtor in good faith makes a transfer for value given at the time, OR IN PURSUANCE OF AN AGREEMENT MADE WHEN THE CONSIDERATION PASSED, such conveyance WILL NOT be an Act of Bankruptcy."

"Equity looks on things agreed to be done as actually performed." *Goodnough M. & S. Co.* v. *Galloway*, 171 Fed., 940-949.

And it was held by the Circuit Court of Appeals for this circuit in the case of *Tomlinson* v. *Bank*, 145 Fed., 824 (76 C. C. A., 400), as follows:

"That where a bank allowed a customer to overdraw on the express agreement that good accounts should be assigned to the bank for collection to pay overdrafts, the SUBSEQUENT ACTUAL ASSIGNMENT OF THESE ACCOUNTS DID NOT CONSTITUTE THE GIVING OF A PREFERENCE, although at the time of the assignment the customer was INSOLVENT."

LEADING CASE ON THIS POINT.

Acts done under agreement contemplating immediate action and transfer so as to bring the matter within the rule that equity will consider a thing done at the time it ought to be done was passed upon by the Circuit Court of Appeals of this circuit, in a very able opinion by Judge Boyd, in the case of *Mills, Trustee, &c.* v. *Virginia-Carolina Lumber Company*, 90 C. C. A., 154; 164

Fed., 168; 21 L. R. A. (N. S.), p. 901 and note, and this case is now considered the leading case on the subject. The note in this latter case is in part as follows:

"This note is confined to cases where the executory agreement as well as the delivery thereunder was within the four months period.

"The note of necessity does not comprehend cases involving the payment of consideration at the time of the transfer, nor cases involving a contemporaneous exchange of property or securities. As thus narrowed, the cases, while not numerous, afford full support of *Mills* v. *Virginia-Carolina Lumber Co.*, and in the main rest upon the ground that the transfer, although made subsequently to the agreement, is in effect, as if made in consideration of a present consideration, and, therefore, but an exchange of securities which does not amount to a VOIDABLE PREFERENCE."

Then follows a long list of cases. See especially *Douglas* v. *Vogeler*, 6 Fed., 53.

Dean not being a creditor at the time of the giving of the deed of trust, the giving of the same was not a preference and cannot be attacked as such.

This Court in the case of *Stewart* v. *Platt*, 101 U. S., 731, said:

"An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his CREDITORS can only complain if he *waste his estate* or give preference in its disposition to ONE OVER ANOTHER. His dealing will STAND if it leave his estate in as good plight and condition as previous."

"Mortgages given to secure a *bona fide* loan, made at the time is valid, though the proceeds were used in paying some creditors in preference to others, and the mortgagee was cognizant of the insolvency and of the intended preference."

George v. *Grant*, 28 Hun., 69. Affirmed in 97 N. Y., 263.

To uphold the doctrine laid down by the Circuit Court of Appeals, in paragraphs 9 and 10 of its opinion, we respectfully submit, would be dangerous in practice and would create great uncertainty in the transactions of merchants, banks and individuals. It never could have been the intention of congress in enacting the Bankruptcy Act to invalidate securities given to secure a loan made in good faith and without any fraud or collusion on the part of the lender to defeat the statute, simply because the lender knew that the money loaned was to be used to pay debts of the mortgagor. The preference, if any existed in this transaction, resulted from the application of the money after it had been advanced by the mortgagee and received by the mortgagor.

A transfer will not amount to a preference if made contemporaneously with, or before the rising or accrual of, the claim. Preference necessarily implies CREDIT. (Remington on Bankruptcy, §1314.)

If this were not so, it would put an end to legitimate business. No business could be transacted with a merchant or other person from the moment he became embarrassed.

In this connection see *In re Davidson*, 109 Fed., 882, from which Remington takes the following quotation:

"So the question is, can a bank, knowing a merchant is hard pressed, *lend the merchant money with which to pay his debts*, the banker at the time and as part of the same transaction, taking mortgage security and but for which the money would not have been loaned * * * The bank did not receive a preference. Without the mortgage, and in the absence of the supposed right to receive the mortgage, the bank would not have parted

with its money. It is a very different case where one is already a creditor and later insists upon and receives security."

THE BANKS WERE PREFERRED, IF ANY ONE AND NOT DEAN.

And it is shown by the opinion of the Circuit Court of Appeals, at page 56 of the record in this case, that it was the owners of the notes held by the banks who were benefited by the payment of their indebtedness and THEY, if any one, received a preference. Dean received no benefit whatever from the payment by the bankrupt to the banks, and was not and could not have been preferred thereby, for he was not prior to the deed of trust in question a creditor of the bankrupt.

The foregoing contention is well sustained by the opinion of the Circuit Court of Appeals in the case of *Jones* v. *Wright, et al.*, found on page 56 of the record in this case. In which case the Court held as follows:

"That at the time of the filing of the petition he was insolvent and that being so insolvent, he did prefer certain of his creditors *who then held his notes*, which had been theretofore executed for value by him and were then held by the banks in Petersburg, Virginia."

The Circuit Court of Appeals in that case having thus declared the recipients (the banks who received the money loaned by Dean to Jones) of these payments to be preferred creditors, it would seem to have been the duty of the bankrupt's trustee to have pursued these preferred creditors, viz., the banks. But for some reason, best known to himself, he abandoned the road thus pointed out in that opinion. He preferred to take another course, and to pursue the man who loaned the money and took security for such present loan. We can only surmise why this has been done. These directors

whose bank has gotten the money due it on these notes, were also the largest creditors of the bankrupt. They now want their pre-existing debts paid before the money advanced by Dean has been returned, and the trustee is doing what he can to aid them. The trustee has seen fit to let the banks escape, although the Circuit Court of Appeals in the above mentioned opinion has adjudged them to be preferred creditors, but seeks to have Dean's deed set aside as a preference.

This, we have seen, cannot be, because it was not given to secure a pre-existing debt. Nor can it be held to be an unlawful preference because not accepted in good faith. On this point the District Court on page 34 of the record says:

GOOD FAITH.

"That it was taken in good faith in the ordinary acceptation of the terms is evident from the testimony * * * and the opinion of this Court so far as his response is concerned is that the transaction was one in which he manifested perfect good faith."

And the Circuit Court of Appeals in referring to this point in the eleventh paragraph of its opinion says:

"Dean, it is true, had no corrupt motive to benefit himself; on the contrary, he was impelled by a laudable and unselfish impulse to aid his brother-in-law in his troubles, and in the effort actually incurred labor and expense with no gain to himself."

The holding by the Circuit Court of Appeals in paragraph 8 of its opinion that the appeal of one charged with a crime, although he be innocent of such a charge, (for there is not one iota of testimony in this case beyond the fact that there was only a rumor of such charge), is a signification of acute financial distress and notice to the world that one has exhausted his credit

and come to the end of his ability to obtain money in the ordinary course of business, would be, we most respectfully contend, a most extraordinary and dangerous doctrine of law to lay down. For it will be readily seen that any one who should be so unfortunate through spite, blackmail or dislike, as to be charged with a crime, although innocent, would be unable to secure necessary funds for his defence from his own estate, which he has the right to dispose of until taken away by law. It would therefore seem to be a very extravagant extension of the doctrine as to what constitutes insolvency under the bankruptcy law to hold that such an appeal, as the one contained in the letter of Jones to Dean on page 17 of the record, under such circumstances as existed in this case, is of itself a signification of financial distress and notice that one has exhausted his credit. Not a single witness in this case has testified that he believed Jones, the bankrupt, to be insolvent at the time of the loaning of the $1,600 to him by Dean. The uncontradicted testimony of Dean is that he was thoroughly convinced that Jones was in good financial condition, and only needed some ready cash to tide him over his threatened embarrassment and with the loan he would be able to carry on his business and farming without being embarrassed in any way. Record, p. 104, top of page. J. W. Long, the trustee's star witness, testified that he did not know at the time that R. Crawley Jones was insolvent. Record, p. 94, his answer to Question 24. In the bill of complaint the trustee alleges and admits that the bank did not know or have reason to believe at the time these notes were paid that R. Crawley Jones was insolvent. What reason then can be given for claiming that at that time Dean knew or had reason to believe Jones to be insolvent? The bank knew all about Jones' monetary condition, including the rumor that one of the endorsements on the notes was not genuine. Five of their directors were among Jones' largest creditors. If the banks, despite this knowledge, did not have reason-

able ground to believe Jones to be insolvent, the same is yet more true of Dean. Record, pages 94, 104 and 112, answer to question 49.

The bill of complaint nowhere alleges, nor is there any proof in the case, that in accepting security for the fair consideration the said Dean knew that the same was to be used in preferring creditors, or that Dean had any relation or connection with said creditors who got the money he loaned, or that he was in any way their representative, or that there was any collusion or any conspiracy between such creditors and Dean, whereby that was done indirectly which is prohibited by the bankrupt act from being done directly.

The decision of the Circuit Court of Appeals on this question therefore should be reversed because it is in conflict with bankruptcy act as well as in conflict with the decision of this Honorable Court in the cases of *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575, and *Coder* v. *Arts*, 213 U. S., 223, and also in conflict with the decisions of its own circuit in the cases of *Crim* v. *Woodford*, 136 Fed., 34.

Davis v. *Turner*, 120 Fed., 605, 613, and
Tomlinson v. *Bank*, 145 Fed., 824.
City Nat'l. Bank v. *Bruce*, 109 Fed., 69.
Mills, Trustee, v. *Va.-Car. Lumber Co.*, 90 C. C. A., 154, 21 L. R. A. (N. S.), 902 and note.

and also in conflict with the following decisions in other circuits:

In re Mahland, 26 Am. Bank. Rep., 81.
In re Davidson, 109 Fed., 882.
In re Soudan Mfg. Co., 113 Fed., 808.
Githens v. *Shiffler*, 112 Fed., 505.
In re Hersey, 171 Fed., 1001.

Grant v. *George*, 97 N. Y., p. 262, 269-70.
In re Clifford, 136 Fed., 475.
In re Baar, 213 Fed., 629-630.
Sabin v. *Camp*, 98 Fed., 974.
Thompson v. *Fairbanks*, 196 U. S., 525.
Sexton v. *Kessler*, 172 Fed., 535, 542-5.
Goodnough M. & S. Co. v. *Galloway*, 156 Fed., 504, 510.
Same v. *Same*, 171 Fed., 940-949.
Douglas v. *Vogeler*, 6 Fed., 53.
Ex parte Stubbins, 17 Chan. Div., pages 67, 68, 69.
In re Maplejack, Ex parte, Caldicott, 4 Chan. Div., 155-6.

FIFTH, SIXTH, SEVENTH AND EIGHTH QUESTIONS.

Whether or not the District Court and the Circuit Court of Appeals erred in holding the deed of trust in question void under Sec. 67e of the bankruptcy act, as having been given with the intent and purpose on the part of the bankrupt to hinder, delay or defraud his creditors, and when accepted by the said Dean he was presumed to have known that it was made in contemplation of the provisions of the bankruptcy act, because he was charged with notice of the insolvency of Jones, and his purpose was to extricate Jones from embarrassment by acting with and for him as his agent in preferring a pressing debt?

Assuming that the complainant was entitled to relief under Sec. 67e of the Bankruptcy Act under the prayer for general relief, although no such relief was asked for in his special prayer, yet we respectfully submit that the decision of the Circuit Court of Appeals affirming the decree of the District Court, which held

the deed of trust in question was fraudulent, is erroneous.

An intent to prefer and an intent to hinder, delay and defraud, are different. And surely it does not follow because a debtor, though insolvent, has the intent to secure one creditor he thereby has the intent to hinder, delay or defraud others. If counsel's contention on this point were sound, in none of these United States, irrespective of the Bankrupt Law, could an insolvent debtor secure a creditor, for in all the states there are laws against conveyances made with intent to hinder, delay and defraud creditors.

Upon this branch of the case the Circuit Court of Appeals for the Eighth Circuit in *Coder* v. *Arts*, 152 Fed. 943, 947 (affirmed in 213 U. S. 223), has well said:

> "The contention that the intent to hinder, delay and defraud other creditors must be inferred from the fact that the inevitable effect of the mortgage was to deprive them of the opportunity to collect their claims in full, and from the rule of law that every one is presumed to intend the natural and probable effect of his acts, is not tenable here. It is every intent to hinder, delay or defraud creditors *unlawfully only*, not every intent to hinder or delay them, that avails to avoid a transfer made for a pre-existing debt under Section 67-e. An insolvent debtor until the commencement of proceedings in bankruptcy still has the *jus disponendi* of his property. He has the right to secure and pay his debts with it, and he has the right to secure and pay one creditor in preference to others, provided always the security or payment is not violative of any of the Acts of Congress or of any of the statutes of the state. A preference of one creditor over others by such a payment or by such security, which is free

from *actual and intended fraud*, and from any purpose to affect other creditors injuriously, beyond the necessary effect of the security or the payment, is valid and lawful, and it cannot evidence such an intent to hinder, delay and defraud as will make it void or voidable under Section 67-e. Every mortgage necessarily tends to hinder or delay creditors other than the mortgagee, but a delay necessarily resulting from a fair and honest exercise of the right to dominion over one's property, and to pledge or otherwise dispose of it, is neither an unjust nor unlawful interference with the rights of others and is not within the terms of the statute making void conveyances intended to hinder or delay creditors."

For a proper discussion of these questions paragraph 11 of the opinion of the Circuit Court of Appeals, which is that part of the opinion that relates to the deed of trust in question being fraudulent and void under §67e, is here reprinted in full (but for convenience is divided up into 9 parts), as follows:

"(1) The mortgage is also obnoxious to condemnation under section 67e, as held by the District Judge. We should not attempt to add anything to his convincing decree on this point but for the strong reliance of counsel for appellant on the case of *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575, recently decided. That case really holds nothing more than had been previously decided in *Coder* v. *Arts*, 213 U. S., 223, namely, that section 67e applies only to actual fraud as distinguished from a mere preference, and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudulent.

"(2) But here there was not only knowledge of an intended preference, but actual participation by the len-

der as agent of the borrower and for his benefit in carrying out the plan of preference which it was obvious would result in closing the business of the debtor.

"(3) Actual fraud has a large signification, and embraces any undue advantage taken of another.

"(4) Dean, it is true, had no corrupt motive to benefit himself; on the contrary, he was impelled by a laudable and unselfish impulse to aid his brother-in-law in his troubles, and in the effort actually incurred labor and expense with no gain to himself.

"(5) But the conclusion cannot be escaped that in his generous zeal he lost sight of the rights of the creditors.

"(6) Having the strongest reason to believe Jones insolvent, he took a mortgage of his entire property in order to enable him to prefer one creditor to the exclusion of all others and enforced the mortgage, with the apparent consent of the debtor, by seizure almost at the instant of execution on the maturity of one small note.

"(7) As a reasonable man he must be charged with knowledge that this course would inevitably result in the reduction of the value of the assets of a debtor already insolvent, the payment of his preferred debt and the failure to pay other debts.

"(8) All this was aiding and acting with Jones to compass the preference of one creditor to the exclusion of others—to take undue advantage of other creditors by depriving them of their rights conferred by the Bankrupt law to share equally in the distribution of the assets of an insolvent debtor.

"(9) However innocent Dean may have been of any formed intention to accomplish such a purpose, he must be charged with this purpose and the consequences of his course of conduct, since the administration of justice all men must be charged with intention to produce the results which the exercise of reason would make

perfectly evident as the results to be anticipated. The decree of the District Court must be affirmed with costs against the appellant."

ARGUMENT.

Discussing these parts of that decision, in their numerical order, we respectfully submit our views and contentions as follows:

(1) This portion of that court's opinion, except the first sentence, is entirely in accord with appellant's contention, and is supported by the decisons of this Honorable Court in the case of *Coder* v. *Arts*, 213 U. S., 223, and *Van Iderstine* v. *Discount Company*, 227 U. S., 575, and should have been decisive of this case.

(2) However, this well-established principle and rule of law as laid down by the Supreme Court, the Circuit Court of Appeals refuses to follow, because, as it says, "here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower and for his benefit in carrying out the plan of preference, which was obvious would result in closing the business of the debtor." The fact that the money loaned would be used in paying the banks, under the circumstances, does not, we respectfully contend, justify the conclusion reached by the Circuit Court of Appeals that such a payment would obviously result in closing the business of the debtor, and it was therefore in error in so holding.

As is well said by Black on Bankruptcy (1914 Ed.), Sec. 459, p. 1002:

> "But where an action to avoid a conveyance or incumbrance is based on the provision of the bankruptcy law which makes such transfers or liens

voidable when made within four months prior to bankruptcy and '*with the intent and purpose to hinder, delay and defraud* his creditors, or any of them, 'an *actual fraudulent purpose* on the part of the debtor is an essential element of the trustee's right of action, and unless it is affirmatively established the transaction must stand good. It is not enough to show that the necessary consequence of the transfer or incumbrance is to hinder, delay or defraud creditors in enforcing their claims, or that it defrauds them in the sense of leaving the debtor insolvent or even penniless, or that the property so disposed of was more in value than the debtor could rightfully withdraw from the reach of his creditors. The statute cannot be read as denouncing any transaction which produces a given result, irrespective of the motive. On the contrary, it is aimed only at such conveyances as would be fraudulent and voidable at common law or under the statute of Elizabeth, and under the bankruptcy act, as in those cases, an *actual fraudulent intent* on the part of the debtor is essential." (Italics ours.)

It is conceded that under the decision in the *Van Iderstine case, supra,* that even if Dean knew that Jones borrowed the money in order to pay off a debt, the transfer would not have been subject to attack by the Trustee, except for the fact that a petition in bankruptcy was filed within four months thereafter. *But it must be kept in mind the institution of such proceedings did not relate back and convert a lawful transfer into a fraudulent conveyance.*

We respectfully submit that there is no allegation in the bill, nor is there any evidence or proof in the record in this case, that Dean acted as or was the agent of Jones, the bankrupt, or that he participated as such for his benefit in carrying out the alleged plan of pref-

erence. The uncontradicted testimony of Dean on this point is found in his answer to question 32 on page 107 of the record, which is as follows: "He (Jones' father) stated to me that his son, R. Crawley Jones, had directed *him* to get the money that I had agreed to loan and had given *him* directions as to the use of the same. He then stated to me that if I had the time that he would be glad if I would go with him to pay the money as directed by his son, which I did." * * * It being a mere coincidence that Dean was present when the money he loaned was used in paying the bankrupt's indebtedness to the bank.

However, if it is not in itself unlawful to prefer, nor fraudulent for one *though insolvent* to borrow in order to use the money in making a preference, how can it be said that such a transaction is made fraudulent just because the borrower acts through an agent in making the preference, when, if he had acted for himself directly, it would not have been fraudulent?

The Circuit Court of Appeals in the case of *Crim* v. *Woodford*, 136 Fed., 34, sustained liens as valid in transactions where the lender acted as agent of the borrower in making preferences. See pages 40 and 41 of this volume as to the liens of Crim and Manown, which decision is in direct conflict with the decision in the case at bar.

For a further and a more conclusive answer to this portion of that court's opinion, we here again quote from page 582 of the decision of this Honorable Court in the *Van Iderstine case, supra*, as follows:

"The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute. One is

malum per se and the other *malum prohibitum*, and then only to the extent that it is forbidden. * * * * *It is, therefore, not in itself unlawful to prefer nor fraudulent for one though insolvent to borrow in order to use the money in making a preference. So even if the Discount Company knew that Fellerman borrowed the money in order to pay off an honest debt, transfer would not have been subject to attack by the Trustee, except for the fact that a petition in bankruptcy was filed within four months thereafter. But the institution of such proceedings did not relate back and convert a lawful transfer into a fraudulent conveyance.*"

"Cases, under the present statute, like *In re Beerman*, 112 Fed., 663, relied on by the trustee, relate to transactions in which the *mortgagee was practically the representative of the preferred creditor* and where, consequently the conveyance was as much subject to attack as though it had been made directly to him. *But here the Discount Company was not a creditor of Fellerman & Son, and had no relation with the persons to whom the money was paid. National Bank of Newport* v. *National Bank of Herkimer*, 225 U. S., 178. The transfer, therefore, was not a preference to the Discount Company and could not be set aside *without proof that it knew that Fellerman not only intended to pay some of his creditors BUT TO DEFRAUD OTHERS.* The difference between the two classes of cases is authoritatively recognized by *Coder* v. *Arts*, 213 U. S., 223, where it was said that 'an attempt to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one.'" (Italics ours.)

(3, 4 and 5) There is no allegation in the bill of complaint filed in this case, nor is there any proof contained in the record in this case, nor has there been any attempt to prove that Dean had any knowledge of Jones' intent to defraud his creditors, if such was the fact. Without such an allegation and proof that Dean had knowledge of Jones' intent, at the time he loaned the money, to defraud his creditors, we respectfully contend and submit that the deed of trust in question, could

not and should not, under the authority of this Court in the *Van Iderstine case, supra,* be set aside under §67e of the Bankruptcy Act. Even if the language used can be so twisted to show that there are sufficient facts alleged in the bill of complaint to the effect that Jones gave the deed of trust for the purposes of hindering, delaying and defrauding his creditors, yet we respectfully submit that there are no allegations in the bill, nor is there any proof in the record, to the effect that Dean had any knowledge of Jones' intent to defraud his creditors, even if Jones did so intend. The absence of this necessary allegation in the bill is easily accounted for by the fact that the bill of complaint filed in this case was originally, as stated in the opinion of the Circuit Court of Appeals, framed in main reliance upon having the deed of trust set aside under §60b of the Act. In fact, the opinion of that court goes only to the extent of holding that Dean "*acted as the agent of the debtor for the distinct purpose of aiding him to prefer a particular debt.*" (See paragraph 10 of that opinion. Record, p. 142.) Under the bankrupt law one has a right to loan a debtor money, and take security therefor, although knowing the debtor would use the same in paying some of his creditors. *Van Iderstine* v. *Nat. Discount Co., supra; Githens* v. *Shiffler,* 112 Fed., 505, 507; *In re Hersey,* 171 Fed., 1001.

(6, 7, 8) We respectfully call attention to the following quotation from Loveland on Bankruptcy (1912 Ed., p. 950, and cases cited, as follows:

"The fact that the mortgagor was insolvent at the time the mortgage is given, and that the mortgagee knew it, does not effect the validity of a mortgage given in good faith and for a present consideration."

In the case of *Davis* v. *Schwartz,* 155 U. S., on page 640, this Court held:

"The fact that the execution of the mortgages was immediately followed by a delivery of possession of the property, so far from being a badge of fraud, has rather a contrary tendency, and was evidently resorted to to avoid an implication of fraud from the retention of possession by the mortgagor. A prompt and vigorous enforcement of an honest debt is by no means indicative of fraud, and it does not lie in the mouth of the plaintiff, who were themselves taking steps in the same direction as the mortgagees, to cavil at their success."

Again this High Court, on page 639, in the same case, held:

"But where a person, being lawfully indebted to several creditors, makes a mortgage or other conveyance to one for the open and avowed purpose of preferring him, then in the absence of a law of the forum prohibiting preferences, such mortgage or conveyance is valid, though it may operate to bar other creditors from obtaining satisfaction of their debts." * * * *

Stewart v. *Dunham*, 115 U. S., 61; *Estes* v. *Gunter*, 122 U. S., 450; *Smith* v. *Craft*, 123 U. S., 436; *Huntley* v. *Kingman*, 152 U. S., 527; *Southern White Lead Co.* v. *Haas*, 73 Iowa, 399; and cases cited.

This Court in the case of *Coder* v. *Arts*, 213 U. S., 223, 242, said:

"The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and to *deprive others of the means of obtaining payment was not sufficient to avoid a conveyance;* but it was uniformly recognized that acting in good faith, a debtor might thus prefer one or more creditors." (Italics ours.)

The Circuit Court of Appeals in part 4 of this part of its opinion, holds that Dean "had no corrupt motive to benefit himself" in this transaction. (Record, p. 143.)

In Collier on Bankruptcy (9th Ed.), on page 950, it is said:

"Deeds of trusts and other transfers made in good faith to secure present loans, protected under a State statute, are within the protection of clause d of this section (§67) and valid liens." Citing:

Crim v. *Woodford* (C. C. A. 4th Ct.), 136 Fed., 34.
Matter of Alden, 16 Am. B. R., 362.
In re Noel (D. C. Md.), 137 Fed., 694.
Wilder v. *Watts* (D. C. of S. C.), 138 Fed., 426.
In re Clifford, 136 Fed., 475.
In re Randolph (D. C. W. Va.), 26 Am. B. R., 623.

VIRGINIA CASES.

We respectfully call your Honor's attention to the decision of the Court of Appeals of Virginia in the case of *Johnson* v. *Lucas*, 103 Va., p. 36:

"In the absence of statute, State or Federal, forbidding it, an insolvent debtor may, *without the imputation of fraud*, prefer one creditor to another, although the preferred creditor may know that the preference will have the effect of defeating the collection of other debts. This is not *hindering or delaying creditors* within the meaning of the statute against fraudulent conveyances, as they have no right to a priority."

See also *Johnston* v. *Witt Shoe Co.*, 103 Va., p. 611.
Alsop, et al. v. *Catlett, et al.*, 92 Va., p. 364.

"The fact that a deed of trust of all of an insolvent's property, executed to secure part of his creditors, provides for payment of the surplus to the grantor, is not of itself evidence of fraudulent intent."

Harvey v. *Anderson*, 2 Va. Dec., 385; Enc. Dig. Va. & W. Va. Report, vol. 6, p. 590.

"Since a debtor has the right to pay one creditor in preference to another, so he may, *without imputation of fraud*, secure one creditor to prevent another from gaining an advantage."

Williams v. *Lord*, 75 Va., 390; *Johnson* v. *Lucas*, 103 Va., 36, 38; *Lucas* v. *Clafflin*, 76 Va., 269.

"Nothing can be more firmly settled than at common law, apart from the statutes of bankruptcy, a debtor, even in failing circumstances, until his property is specifically bound to the satisfaction of his debts, has an absolute right to dispose of it at his pleasure. He may give an undue preference to a part of his creditors, or even to one, and such preference * * * cannot be treated as a fraud."

Alexander Sav. Inst. v. *Thomas*, 29 Gratt., 483, 490; Va. & W. Va. Dig., p. 590, vol. 6.

"At common law a man, though insolvent, until a lien became fixed in some way on his property, might, *without fraud*, convey or transfer it in trust, and prefer one creditor over another, even though it left no estate to pay other creditors."

Va. & W. Va. Dig., Vol. 6, p. 590; *Skipwith* v. *Cunningham*, 8 Leigh, 271.

It has never been held in Virginia to be a fraud upon the other creditors to pay one creditor to the exclusion of another. The Virginia statute with regard to fraudulent conveyances is copied from that of 13th Elizabeth, and Congress in incorporating into the bankruptcy law the words "to hinder, delay and defraud his creditors" used the same wording and intended the same meaning to attach that has always formerly attached to these words which have been used from time immemorial.

(7) We respectfully submit that the transaction

in question did not result in a reduction of the value of the assets of the debtor, and this is clearly shown by the uncontradicted testimony of Claude M. Dean, which appears on page 107 of the record, in his answers to questions 32 and 33, which are as follows:

"32nd Q. What did you do then? A. He stated to me and his son, R. Crawley Jones, had directed him to get the money that I had agreed to loan and had given him directions as to the use of the same. He then stated to me that if I had the time that he would be glad if I would go with him to pay the money as directed by his son, which I did. He first went by a bank in Petersburg and paid that bank three or four hundred dollars and then we went to the Virginia National Bank, of which Mr. J. W. Long is the cashier, and Mr. J. Samuel Jones paid the notes held by the bank of which Mr. Long is the cashier, amounting to between $1,900.00 and $2,000.00, using the $1,600.00 that I loaned, together with some money he, J. Samuel Jones, had loaned his son to do so.

"33rd Q. And I understand, the net result of the transaction was that the aid of your $1,600.00, something like $2,300.00 of R. Crawley Jones' debts were paid, for which no security was taken except your $1,600.00? A. Yes, sir."

ESTATE MUST BE DIMINISHED.

Collier on Bankruptcy (10th Ed.), on pages 803, says:

"So, also, where the transfer does not diminish the general fund, as where it consists of the giving of a fair security for a present loan * * * no preference results." Citing:

Ernst v. *Mechanics' & Metals Nat. Bank* (C. C. A., 2nd Cir.), 201 Fed., 664; affirmed 231 U. S., 60.

Furth v. *Stahl,* 10 Am. B. R., 442.

In re Sayed, 185 Fed., 962.

EXCHANGE OF VALUES.

In *Cook* v. *Tullis*, 18 Wall., 332, the Supreme Court uses the following language:

"A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the bankruptcy act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealings with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously."

That language was quoted in *Stewart* v. *Platt*, 101 U. S., 818. The same principle may be found announced in *Jaquith* v. *Alden*, 189 U. S., 78.

A mere exchange of one kind of property or security for another of equal value does not constitute a preference.

Remington on Bankruptcy, §§1295, 1320.
In re Noell, 137 Fed., 694.

"A fair exchange is no robbery. Mere exchanges of property and changes in its form, as *likewise transfers of it* for which are received at the same time assets of equal value, do not deplete the estate nor constitue a basis of preference."

Remington on Bankruptcy, §1295.

"Some portion of the debtor's property must have been appropriated by the transaction, and the insolvent's estate thereby diminished. Preference implies appropriation of assets and depletion of the trust fund thereby."

Remington on Bankruptcy, §1278.

In re Hawks, 30 Am. Bank Rep., 373, it was held as follows:

"This leaves for determination the main question in issue—whether the evidence establishes fraud on the part of the Commission Company, in aiding the bankrupt to fraudulently obtain credit for the purchase of merchandise, whereby the Commission Company would finally be benefitted in the collection of the indebtedness due it.

"There are certain well-settled rules of law to guide the courts in the determination of such an isssue. If the circumstances proven are just as consistent with honesty and good faith as with a fraudulent intent, the inference of fraud is unwarranted. *U. S. Fidelity & Guar. Co.* v. *Des Moines Nat. Bank*, 145 Fed., 373, 74 C. C. A., 553. To establish fraud, the proof must be clear, unequivocal, and convincing. *Jones* v. *Simpson*, 116 U. S., 609; *Thorwegan* v. *King*, 111 U. S., 549; *Walker* v. *Collins*, 59 Fed., 70; *Foster* v. *McAlester*, 114 Fed., 145; *Schagun* v. *Scott Mfg. Co.*, 162 Fed., 209. Proofs which only create suspicion are not sufficient to warrant a finding of fraud. *United States* v. *Hancock*, 133 U. S., 193. A mere preponderance of evidence, which at the same time is vague or ambiguous, is not sufficient to warrant a finding of fraud. *Lalone* v. *United States*, 164 U. S., 255."

NINTH QUESTION.

Whether or not a deed of trust given by one merely charged with a crime to secure a present loan, the proceeds of which are to be used in paying certain of his creditors to extricate himself

Supreme Court of the United States.

No. 364.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE, ET AL., APPELLEES.

THE PRESENT BANKRUPTCY LAW DOES NOT IMPOSE PENALTIES AND THEREFORE THE BANKRUPTCY COURTS HAVE NO POWER TO INFLICT THEM.

It is claimed that the deed of trust in question was given in fraud of the bankruptcy act because it is said that Dean, as agent of the bankrupt, secured the evidence of the indebtedness,—the notes on which it was rumored one of the endorsements was forged. The learned judges of both the District and the Circuit Court of Appeals have assumed the guilt of R. Crawley Jones of the offense concerning which there was no proof and have further presumed without evidence that there was an unlawful agreement on the part of Dean to get possession of the evidence of Jones' assumed guilt and to suppress it. They overlooked the fact that the money was used to pay an honest debt, even though the evidence of the debt may have been dishonest and criminal. These learned judges further hold that this assumed result of

Dean's conduct is in fraud of the bankruptcy act and that Dean should be penalized for what, in every other respect, was a perfectly valid transaction under the decisions of this Court, by having his deed declared to be a fraudulent deed. But we submit there is nothing in the bankruptcy law that authorizes the imposition of such a penalty for a transaction otherwise valid. The sole object of the bankrupt law is equality of distribution. This object this Court has repeatedly said is not interfered with by loaning money to a debtor and taking security therefor, even though the lender knows that the borrower is insolvent and intends to use the fund to prefer some one or more of his creditors. If, in preferring such an honest debt with the money, the debtor receives the evidence of such indebtedness about the legality of which there is a uestionable rumor, can the lender be punished and penalized by having his deed, for that reason, declared void? In short, is the bankrupt act an act for the punishment of supposed crime or of condoning a felony or at least of suspected suppression of evidence of the crime? Certainly, there is nothing in the bankruptcy act that lends itself to this view of imposing a penalty upon Dean for his supposed abetting Jones in the recovery of evidence of his crime. Such penalty or punishment, if any, belongs to another jurisdiction and tribunal, and there is nothing in the bankruptcy statute which allows the imposition of such a penalty. Yet this is the effect of holding, as do Judges Woods and Smith, that, because Dean, it is claimed by them, aided Jones in securing this assumed evidence of crime, the bankruptcy court must penalize Dean for his alleged unlawful conduct by declaring the deed of trust given him to be fraudulent. Such a construction of the bankrupt law is opposed to its sole object and finds no basis in any of its provisions.

No such penalty is imposed by the bankruptcy act, and therefore none can be imposed because the evi-

dence of the debt may have had forged endorsements thereon, since the bankruptcy law is not a statute for imposing penalties, but simply and solely for the equal distribution of the property of the bankrupt. If the act of Dean is such as should be penalized it must be done in some other court and under some law other than that of the bankruptcy law.

On this point, this Honorable Court, in the case of *Keppel* vs. *Tiffin Savings Bank*, 197 U. S., 356, held on page 363, as follows:

"It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it, to prove his debt and thus suffer no other loss than the costs of litigation. *The fallacy lies in assuming that courts have power to inflict penalties, although the law has not imposed them.*" (Italics ours.)

from the embarrassment of the charge, is valid under the bankruptcy act, even though the grantor is insolvent, and the lender knows that the money he is loaning is to be so used?

AS TO THE ALLEGED FORCED ENDORSEMENT.

Much stress is laid by the learned Judge, who prepared the opinion of the Circuit Court of Appeals, upon the letter Dean received from Jones relative to his being charged with an offense. The proof in this case only shows that there was a mere rumor that one of the endorsements on the notes was not genuine. (Record, p. 103.) R. Crawley Jones' anxiety regarding this criminal charge is no proof of guilt, for, as he well says, the disgrace of the charge would always cling to his family whether he were innocent or not. But even if we assume that such endorsement was actually forged by Jones, yet we submit, the use of the money obtained from Dean, to pay these notes along with others, cannot affect the legality of the security taken by Dean. The money raised on the alleged forged notes, as far as this record shows, was used in the business of the bankrupt, and hence was a valid debt against him. See *Peters* v. *Bain*, 133 U. S., 670, 679, 686.

The facts in the case at bar and those in the cases of *Ex parte Stubbins*, 17 Ch. Div. (L. R., 1881), p. 67-9, and *Ex parte Caldecott*, 4 Ch. Div. (L. R., 1876), p. 155 and 156, are so similar, and the decisions in these cases are so decisive of this case, that for the convenience of the court, we here print the same at length, as follows:

Ex Parte Stubbins.

17 Chancery Division, pp. 67, 68 and 69.

James, L. J.:

"The facts of the case are few and not in dispute. The debtor applied to the Appellant and offered to sell him a large quantity of goods, amounting in value to £2,050. The Appellant was reluctant to buy them, but to induce him to make the purchase the debtor communicated to him that he was in great difficulties, as he appears in fact to have been, his bankers having refused him any further credit, and also that he had misappropriated trust moneys belonging to a trust estate of which he and the Appellant were trustees, and he told him in effect that he wanted to sell the goods in order to raise the money to make good that defalcation. Thereupon the appellant was minded to make the purchase, and he agreed to make it at a price to be fixed by means of samples which were to be sent to a London broker, who was to fix the proper trade price for them. This being agreed to, the money was paid to the debtor, who, with the knowledge of the purchaser, immediately went to a bank in which there was a joint trust account in the names of the trustees, and paid the purchase-money to the trust account, so as to make good his defalcation. The goods were delivered in pursuance of the contract. The particular goods, the subject matter of the contract at that time, did not, as it turned out, amount in value to the purchase-money paid, but an additional quantity was subsequently added to make up the value. After the bankruptcy, which did not take place until two months after this transaction, the trustee having investigated the matter, applied to the County Court for an order directed against the trust estate, that is, against both the trustees as representing the trust estate, to restore the money which had been so paid to the bankers to the trust account. Upon hearing before the County Judge he was not persuaded to accede to the application in the form in which it was made; he declined to make any order against the trust estate as such, but he found his way to make an order against one of the two trustees, that is, against Mr. Gaunt, the purchaser, on the ground of a voluntary preference. He worked it out in this way—he considered that the £2,050, which was paid under the circumstances which I have mentioned, was a loan from the one trustee to the other to

enable him to make good the defalcation, and that then the goods were delivered by way of voluntary preference in satisfaction of the debt which had been so created. The Chief Judge was of opinion that this view of the transaction could not be sustained, that, whether it could or could not be impeached upon other grounds, it would be impossible to convert that, which was really a payment in respect of goods to be delivered, into a loan, and then to treat the delivery of the goods as a payment or satisfaction of that loan. *In that view I entirely concur. It is impossible, as it seems to me, that the transaction can be converted from that which it was into something which it was not, in order to bring in the doctrine of voluntary preference.* And in truth the view of the case was abandoned upon the argument of the appeal before us; it was admitted by the Appellant's counsel that they could not sustain it. But it was pressed upon us that the order of the County Court Judge could be sustained on the ground that the sale was itself a fraudulent transfer, that is, that the transfer of goods to a purchaser for value with the view of using the purchase-money for a voluntary preference, the purchaser knowing this intention, was a fraudulent conveyance or transfer within the meaning of the 6th section of the Act. It appears to me that that view cannot be sustained. *In truth, a mere voluntary transfer, impeachable only on the ground that it is a preference of a particular creditor, has never been held to be in itself a fraud,* or an act of bankruptcy. It may be impeached on the ground that it is voluntary, but it is impossible, as it appears to me, to hold that a mere voluntary transfer is of itself an act of fraud. *And, if that is not fraudulent within any principle of law, it would be equally impossible to say that a sale becomes fraudulent because there is an intention in the mind of the vendor to use the purchase-money for the purpose of making a voluntary preference, and the purchaser knows that that is the motive of the sale and the intention of the vendor with respect to the proceeds of the sale. It appears to me that it would be an extravagant extension of the doctrine of fraud on the bankruptcy law to hold that such a sale under such circumstances is of itself a fraudulent act or an act of bankruptcy.*

"It was then contended that the appellant might

fall back on the original form of the application to the County Court Judge, for an order against the trust estate as such to restore the money which had been paid to the credit of the two trustees in the banking account of the trust estate, on the ground that that payment was a voluntary preference of the trust estate. It appears to me that that view also cannot be sustained. In truth the County Court Judge declined to accept it, and he must be considered to have dismissed the application so far as it was based upon any such view, and there has been no appeal from his decision in respect of that, and we have not really before us now any persons representing the trust estate. This might be sufficient to dispose of the application in that point of view. But I am of opinion that the County Court Judge was right, and that it is impossible to bring such a transaction within the doctrine of voluntary preference of a creditor. In order to do that there must be a payment or a transfer of goods by a debtor to a creditor or to somebody in trust for a creditor. Here the creditor was the trust estate, if it could be called a creditor at all. If a debtor on the eve of insolvency, and just before he becomes bankrupt, sells goods in order that he may restore money which he has stolen from his master or from anybody else, and does restore the money, it seems to me impossible to hold that such a payment can be treated as a fraudulent preference of a creditor."

Brett and Cotton, LJJ., concurred. (Italics ours.)

In re Mapleback, Ex Parte Caldecott.

4 Chancery Division, 155 and 156.

James L. J., delivered the judgment of the court (James, L. J., Baggallay, J. A., and Bramwell, J. A.), as follows:

"The Appellant complains of an order of the Chief Judge by which he was ordered to pay to the trustee of the bankrupt the produce of certain goods seized and sold by him.

"They were so seized and sold under a bill of sale duly registered by which the goods had been assigned.

"The consideration for the bill of sale was £100

then advanced, and £100 previously due. It is not questioned that the £100 was so previously due, and that there was re[illegible]and truly advanced the further sum of £100.

"The right of the Appellant, which on this short statement of facts would seem unquestionable, is impeached on the following ground: Before advancing the second £100 the lender had received from the bankrupt a letter in the most piteous terms, informing him that a bill was becoming due at a banker's which bore the signature, forged, of the lender, and that the bank would, on dishonour of the bill, of course, apply them to the latter, which would lead to a discovery of the crime with all its consequences of punishment to the forger, and ruin to himself and family. In the same letter he offered, if the advance were made, to give a security as well for that as the previous debt. Moved by this letter, the Appellant lent the money, which was applied in taking up the bill, and the security was given, as promised, for that advance and the previous debt. The Chief Judge was of opinion that the lending of the money under those circumstances was such a violation of public policy as to taint and avoid the whole security, and to make it impossible to allow the appellant to retain the proceeds of it, although actually realized and received by him. If the appellant had been plaintiff or claimant, he certainly would have been in a very difficult position. It was not compounding a felony; it might perhaps not have been strictly a misprison of felony, but it was a transaction which was intended to result, and did result, in preventing the discovery of a felony, and getting into the criminal's own hands the most important piece of evidence. It is, however, not necessary to express any actual judgment on how the case would have stood if the appellant had been plaintiff.

"But there is another consideration which appears to us sufficient to dispose of this case. If there was a legal misdemeanor, the bankrupt was a party to it. *In pari delicto, potior est conditio possidentis aut defendantis.* The bankrupt could not have recovered back the proceeds of the sale of the goods, and his trustee cannot be in a better position than the bankrupt. If the bankrupt had repaid the loan the trustee could not recover it. If the bankrupt had actually given money as a

bribe, or parted with property for any other illegal purpose, his trustee could not recover it back any more than he could himself. This is not one of the cases in which the trustee in bankruptcy stands in a better position than the bankrupt. *For, however wrong the transaction may have been in law, it was no wrong against the bankrupt law; there was nothing done with intent to delay or defeat creditors, or to defraud any one.* For all purposes of the bankrupt law, the bill of sale was a bill of sale for a past debt, and a sufficient present advance. And except where there is an offense against the bankrupt law, or against some law in favor of creditors, the trustee is merely the legal representative of the debtor, with such rights as he would have had if not bankrupt, and no other.

"The order of the Chief Judge was accordingly discharged." (Italics ours.)

The above case is cited with approval in the case of *Githens* v. *Shiffler*, 112 Fed., 505-507, and *Githens* v. *Shiffler* is cited with approval by the Supreme Court in *Coder* v. *Arts*, 213 U. S., pp. 223-241.

And the same doctrine is followed by the Supreme Court in *Tiffany* v. *Boatman's Institute*, 18 Wall., p. 388-9. In this case the Supreme Court said:

"In the nature of things he cannot borrow money without giving security for its repayment, and this security is usually in the shape of collaterals. Neither the terms nor policy of the Bankrupt Act are violated if these collaterals be taken at the time the debt is incurred. His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. Nor in doing this does he prefer one creditor over another, which is one of the great objects of the bankrupt law to prevent. The preference at which this law is directed can only arise in case of *an antecedent debt*. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred if the debtor had a good reason to believe the debtor to be insolvent. But

the giving of securities when the debt is created is *not* within the law, and if the transaction is free from FRAUD IN FACT, the party who loans the money can retain them until the debt is paid. In the administration of the bankrupt law in England this subject has frequently come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, *no matter what his condition may be*, and that the party making these advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect." (Italics ours.) See *In re Busby*, 124 Fed., 469.

The decision of both the Circuit Court of Appeals and the District Court on this question is, therefore, under the foregoing authorities, in conflict with the Bankruptcy Law, the decisions of this Honorable Court, the various Circuit Courts af Appeals, those of its own circuit, and the Bankruptcy Courts of England, and being clearly erroneous should be reversed.

In conclusion we insist that the deed of trust was given and accepted in entire good faith and not in contemplation of or in fraud upon the Bankruptcy Law, and that it is valid within both letter and spirit of the law, and therefore we respectfully ask that the decree of the Circuit Court of Appeals for the Fourth Circuit and that of the District Court for the Eastern District of Virginia be reversed with costs to your appellant, and the cause be remanded to the said District Court with instructions to that Court to direct the appellees to pay over to your appellant the said sum of $1,634.00 (the amount representing the net proceeds of the property embraced in the said deed of trust in question) with interest thereon, and to dismiss the bill of complaint.

Respectfully submitted,

WYNDHAM R. MEREDITH,
C. V. MEREDITH,
Counsel for Appellant.

March 20, 1916.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 364.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, AND W. P. WELLS, SUBSTITUTED TRUSTEE,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF OF APPELLANT.

Appellees on page 40 of their main brief virtually concede that the Circuit Court of Appeals was without authority to hold the deed of trust in question invalid as an illegal preference under Section 60-b of the Bankruptcy Act. This concession is in harmony with the position taken by counsel for the appellees in the oral argument of said cause in the Circuit Court of Appeals. At this argument counsel for appellees, in response to

a question by one of the Judges sitting in the case there, made the positive statement at the bar of that court, that he relied entirely upon 67-e in having the deed of trust set aside. Therefore it would seem the THIRD and FOURTH QUESTIONS involved in this case for the determination of this Court, and covered by assignment of errors 3, 5, 6, 7, 9, 10 and 15, are eliminated by the admission of counsel for the appellees, and the error of the Circuit Court of Appeals in holding the deed of trust invalid under Sec. 60-b admitted and conceded.

REPLY TO ARGUMENT ON MOTION OF APPELLEES TO DISMISS APPEAL.

The first eleven pages of the Appellees' main brief is devoted to their motion to dismiss the appeal in this case on the ground that because, in entering a decree directing that the funds, realized from the sale of the property mentioned in the deed of trust, be deposited to the credit of that court *In the matter of R. Crawley Jones, bankrupt,* in the Planters National Bank, the designated depositary for bankruptcy funds, the District Court added thereto a clause allowing the appellant's claim as a general creditor or as an unsecured debt, upon having its attention called by the said Dean to an agreement between counsel for the appellees and himself that, in case the UNITED STATES COURTS should declare the deed of trust invalid, the Appellant should have the right to share as a general creditor.

We respectfully submit, that such action on the part of the said District Court cannot be considered on the part of Dean as a waiver of his said security, the validity of which he is now contesting in this appeal in this Court; nor is he estopped thereby from questioning in this Court the correctness of the decree of the Circuit Court

of Appeals appealed from, since his right to share as a general creditor was, by the expressed terms of the agreement, to which the Court's attention was called, only in the event this Court as well as the other UNITED STATES COURTS were to hold his deed invalid.

The allowance of Dean's claim as a general creditor in the bankruptcy proceedings because of the above described agreement between counsel for appellees and the appellant is certainly not a waiver, either expressed or implied, of his right of appeal to this Court in this independent suit; nor is it an admission that the decree he seeks to reverse in this suit is not erroneous; nor does such an entry take from the appellees anything, on the reversal of the decree, to which otherwise they would be entitled, for they cannot deny that this sum allowed him as a general creditor at least is due and payable out of the fund to him.

Page v. *Rogers*, 211 U. S., 575-581;
Keppel v. *Savings Bank*, 197 U. S., 356.

This Honorable Court, in the case of *United States* v. *Dashiel*, 3 Wall., on page 697, held:

> "Where a writ of error is taken to the appellate Court by a plaintiff below who previously to taking the writ of error issues execution below and gets a partial but not a complete satisfaction on his judgment, the writ of error will not, in consequence of such execution merely, be dismissed."

In the case of *Erwin* v. *Lowry*, 7 Howard, 184, the amount of the judgment was paid to the sheriff in August, and paid by the sheriff to the creditor and appellant Erwin in November, 1844. The writ of error was sued out in May, 1845, and there accompanied the record an assignment of errors. The defendant asked to have the

writ of error dismissed on the production of a copy of Erwin's receipts to the sheriff, on the ground that by receiving the money, Erwin released the errors complained of.

The court held that the motion came too late to be heard, but that if it could be heard it was no bar. This Honorable Court said:

> " * * * Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many of the cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed . . . it is the duty of the inferior court . . . . to restore the parties to their rights."

The industrious counsel for the appellees have presented to the court no authorities to support his motion. There are none based on sound principles of justice.

ALL PARTIES ARE IN *STATU QUO.*

No dividends have been paid to any of the creditors of the bankrupt, nor has the position of any of the creditors changed because of the action of the District Court in allowing the claim of Dean as a general creditor. So far as the creditors in this case are concerned matters are in *statu quo.* In fact, the District Court, acting upon the motion of counsel for the appellees, has positively refused to permit a distribution of the fund pending this appeal. (See Appellant's Answer on Motion to Dismiss, page 4.) The fund has been, upon the motion of counsel for the appellees here, recently re-deposited so as to bear interest during the pendency of

this appeal. The fund, therefore, is bearing interest and is being held at the direction of the District Court to await the decision of this Honorable Court in this appeal. The foregoing facts conclusively show that the decision of this Court will be respected, put into effect and carried out; and further show that the said District Court itself does not even construe the clause put in its decree allowing Dean's claim as a general creditor to be a waiver of his said security. Hence, we respectfully submit that the appeal in this case does not present a *moot question,* as he contends, nor is your appellant thereby estopped from prosecuting his said appeal.

To grant the appellees' motion to dismiss this appeal upon the grounds set out in their motion and brief in support of same, under the circumstances of this case, would be a great miscarriage of justice, and would be to permit lower courts to put upon litigants terms of constraint which would operate under the shadow of their necessities to deprive them of the right to bring their causes to this the tribunal of last resort established by the constitution of the United States for the correction of errors.

To do so might, and doubtless would, operate in many cases, as it would in this, in a hardship and oppression upon those most dependent upon the courts of the country for their protection. In this particular case, as will be seen by the agreement (Record, page 15) entered into between counsel for the appellees and the appellant, it was mutually agreed and understood that the validity of the said deed of trust in question was to be contested in ALL THE UNITED STATES COURTS and the fund, representing the proceeds from the sale of the property mentioned in the deed of trust, was to be held until *all of the said United States Courts* had

passed upon the validity of said deed of trust, and there was certainly no agreement or understanding of compromise by which it was agreed to release errors, and we think there is no rule of law which effects that end.

Surely the error of counsel for the appellees, in presuming that the denial of the petition for a writ of *certiorari* in this case was equivalent to an affirmance of the decree now sought to be reviewed, will not be permitted to deprive the appellant of his legal rights to prosecute this appeal, just because on account of this error the appellees' counsel prematurely applied to the District Court to have the fund distributed and thereby caused the District Court to prematurely enter the order allowing your appellant to share therein as a general creditor.

Hamilton Shoe Co. v. *Wolf Brothers,* 240 U. S., 252.

The Supreme Court of Virginia in the case of the *Southern Railway Co.* v. *Glenn,* 98 Va., pages 318 and 319, in passing upon a question similar to the one involved in the motion to dismiss, said:

> "It is further insisted that the appellants have lost their right of appeal because Mr. Howard, their counsel, agreed that, notwithstanding the fact that he differed with the court as to its power to allow the trustee additional compensation, he would not contest the matter. It is true, Mr. Howard, does state in his deposition that he did not appeal from the court's action allowing such compensation, because he wished the trustee to be fully compensated. Such a statement as this is clearly no such agreement as would prevent the appellants from appealing. There is no pretence that there was any consideration for it. Even if the appellants themselves had told the trustee that they did not intend to, and would not, appeal, it would not

have prevented them from appealing, unless there had been a consideration for it, or the trustee had acted upon such statement to his prejudice, and of this there is no evidence.

"The fact that the appellants received the several sums decreed them from collections made by the trustee was not, as appelleee insists, a waiver of their right of appeal as the sums allowed the trustee as additional compensation for his services. Where a decree is entered for less than the party claims, receiving payment of the sum so decreed is not a waiver of errors, nor does it estop him from appealing from the decree, so far as it does not allow him what he claimed. *Morris* v. *Garland, &c.*, 78 Va., 215; *Embrey* v. *Palmer*, 107 U. S., 3."

APPELLANT HAS NEVER FILED A CLAIM TO HAVE HIS DEBT ALLOWED AS AN UNSECURED CREDITOR.

The counsel for the appellees is in error in his statement made on page 2 of his motion to dismiss, and on page 4 of his brief in support of motion, as well as on page 11 of his main brief, that the appellant filed his claim as an unsecured creditor. If there is any question as to this, counsel for appellees is challenged to produce same or a certified copy thereof.

Under the foregoing facts and authorities we respectfully ask that the motion to dismiss this appeal be denied.

On the motion to dismiss, in conclusion we wish only to say, that if the entry of the clause in decree of the District Court allowing the claim as a general creditor can in the remotest way be considered a waiver of the appellant's security, then we wish to call this Honorable Court's attention to the fact that the appellant has, as a matter of precaution, applied by petition to the District Court for permission to withdraw the same and

asked that said clause be stricken out of its said decree. A copy of which petition is filed with the Clerk of this Court. Such a procedure being approved and allowed in the following cases: *In re Weaver,* 144 Fed., 299; *In re Wilder,* 101 Fed., 104; *In re Falls City Shirt Mfg. Co.,* 98 Fed., 592; *In re Friedman,* 1 Nat. Bankr. News, 208; *In re Richard,* 94 Fed., 633; *In re Bear,* 8 Fed., 429; *In re Van Buren,* 2 Fed., 643; *In re Brand,* 2nd Hughes, 334; Fed. Cases No. 1809; *Ex parte Harwood,* Crabbe, 496 Fed. Cas. No. 6185; *In re McConnell,* Fed. Cas. No. 8712; *Ex parte Latsley,* Fed. Cas. No. 8083; *Phillips* v. *Bowdoin,* 52 Ga., 544, 14 N. B. R., 43. Black on Bankruptcy (2nd Ed.), Sec. 563, p. 1190.

Mr. Black, in his excellent book on Bankruptcy, in commenting on this question, in Sec. 563, says:

> "If a secured creditor proves his claim as unsecured, but does so through mistake or inadvertence or ignorance of his legal rights, and without being aware of the effect which such a course may have as a waiver or abandonment of a security, he should not be compelled to forego the benefit of the security and participate as a general creditor, but it is in the discretion of the court to permit him to withdraw his proof and rely upon the security, or to amend the proof by stating the fact and the particulars of the security, and this permission will ordinarily be granted where no fraud appears and no one else will be prejudiced in his rights."

Remington Bankruptcy, at Sec. 623, says:

> "The right of withdrawal is an absolute right of the claimant and is not subject to the discretion of the court."

In *In re Stewart,* 178 Fed., 463, it is held:

> "I do not think it within the power of the Court, or referee, to prevent such withdrawal or abandon-

ment of the claim presented. The withdrawal is a matter of right in the creditor and not a matter of discretion with the referee or judge."

WHY THE EVIDENCE IN THIS CASE SHOULD BE REVIEWED IN DETAIL.

While well aware of the rule established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings, unless clear error is shown, we respectfully submit that in view of the fact that the testimony in this case was taken entirely before a notary public, and though the District Court did make a finding of facts the Circuit Court of Appeals did not, yet the findings made by the District Court we most seriously contend were influenced by erroneous views of the law, and therefore this Honorable Court should not accept those findings, but should review the evidence in detail.

Page v. *Rogers, Trustee*, 211 U. S., 575-577-578.

AS TO DEAN HAVING A REASONABLE CAUSE TO BELIEVE JONES INSOLVENT.

If counsel for appellees, who has been such since the beginning of this suit, did not believe Jones insolvent at the time of the giving of the deed of trust in question, and the cashier of the bank that received the money loaned and who knew all about Jones' financial affairs, says he did not know he was insolvent at the time, how can it be seriously contended that Dean had a reasonable cause to believe Jones insolvent at the time he loaned the money and took the deed of trust as a security therefor?

The record and proofs in this case shows that Bartlett Roper, Esq., who is the present counsel for the ap-

pellees, and has been such since the beginning of this suit, and is most familiar with every detail in connection therewith, did not consider R. Crawley Jones insolvent even as late as September 21, 1909. On that day the record in this case shows he prepared and obtained from R. Crawley Jones to himself and others a second deed of trust on all of the same property, goods, &c., set out and contained in the deed of trust from the said Jones to the said Dean, and the trustee therein was directed to withhold the sum of $1,600 due the appellant, and "distribute the balance pro rata and without priority or preference among the unsecured creditors of the said R. Crawley Jones." This deed of trust was put in evidence by the counsel for appellees and is referred to on page 121 of the printed record. However, by agreement of counsel the same is not printed in full in the record, but the original thereof is certified up as an original exhibit "C. M. D. No. 7." Can it therefore be seriously said that Mr. Roper believed Jones insolvent at that time, as he now contends? If so, why was he so active in securing and taking a second deed of trust on this identical property from Jones? There is but one answer, and that is, that he, like Dean and the Cashier of the Bank, who knew all about the financial affairs of Jones, did not believe Jones was insolvent at that time. If Counsel for the appellees and the Cashier of the Bank, and Jones' father did not believe R. Crawley Jones was insolvent at that time, how can it be said that Dean had a reasonable cause to believe him insolvent? In fact, every one concerned or interested in the matter at that time were so certain of Jones' solvency it was agreed that the Trustee should not sell the furniture of Jones until everything else had been disposed of. They thought the other assets would sell for sufficient and it would not be necessary to dispose of his furniture. (Record, page 29.)

In fact the record shows not a single witness has testified in this case that he believed R. Crawley Jones to be insolvent at the time.

ADDITIONAL AUTHORITY IN SUPPORT OF APPELLANT'S CONTENTION THAT THE DEMURRER SHOULD HAVE BEEN SUSTAINED AND THAT THE DEED OF TRUST IS NOT FRAUDULENT AND VOID UNDER SEC. 67-e.

In the case of *Traders' National Bank* v. *Steers, et al.*, 165 Mass., 389, the Supreme Court of Massachusetts, approves the doctrine and principle of law laid down by the Lord Justices of England in the case of *In re Maplebach, Ex parte Caldecott*, 4 Chan. Div., 150, 155-6, cited by Appellant, on page 64 of his main brief, in support of his contention that the giving of the deed of trust in question was not a fraud upon the creditors of Jones, nor a fraud against the bankruptcy law.

In this case of the *Traders' National Bank* v. *Steers, et al., supra*, the defendants demurred to the bill and assigned as a ground therefor *that there was no sufficient allegation of fraud.* At the hearing in the lower court, the demurrer was sustained, and the bill dismissed, and the ruling of the lower court was sustained by the Supreme Court of Massachusetts. The facts in that case grew out of a transaction somewhat similar to the one in this case and the allegations of the bill were similar to those in the bill in this case.

REPLY TO ARGUMENT OF APPELLEES THAT THE DEED OF TRUST IN QUESTION IS INVALID UNDED SEC. 67-e OF THE BANKRUPTCY ACT AND COMMENT ON THE AUTHORITIES CITED BY APPELLEES.

Counsel on page 22 of his main brief, in support of his contention that the deed of trust is invalid under Sec. 67-e of the Bankruptcy Act, states as follows:

"We will now consider briefly the law bearing on the facts as disclosed by the record, and see what has been the ruling of the courts in cases involving a similar state of facts.

"Under the act of 1867 all transfers out of the due course of trade were *prima facie* evidence of fraud and the same rule applies under the Act of 1898."

And in support of this contention he cites the cases of *Walburn* v. *Babbitt,* 16 Wall., 577; *In re Knof,* 146 Fed., 109, and *Dokken* v. *Page* (C. C. A., 8th Ct.), 147 Fed., 438.

The learned counsel for appellees is evidently not aware that the Circuit Court of Appeals for the Eighth Circuit, which Court rendered the decision in the above cited case of *Dokken* v. *Page, supra,* has since the decision in that case, overruled the contention of the appellees and qualified its former decision, as will be seen from the following extract taken from an opinion of that court, which it rendered in the case of *Houck* v. *Christy,* 152 Fed., 615, which is in the following language:

"We have not failed to consider the appellant's contention that this case is necessarily ruled by *Walburn* v. *Babbitt,* 16 Wall., 577, 21 L. Ed., 489, where it was held that a sale, assignment, transfer, or conveyance made out of the usual and ordinary course of business of the debtor, as a sale by a retail merchant of his entire stock of goods, is, without more, *prima facie* fraudulent, and puts upon the vendee the burden of proving that he purchased in good faith. But, as that decision turned upon the provision in the former bankruptcy act, 'and if such sale, assignment, transfer, or other conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud,' and as the present act contains no such provision, we do not assent to the contention. In the absence of such a statutory provision,

the fact that a sale, assignment, transfer, or conveyance is made out of the usual and ordinary course of business does not, without more, render it *prima facie* fraudulent; but it may be a badge of fraud, of little or considerable influence, depending upon the surrounding facts. 2 Bigelow on Fraud, p. 439; Bump on Fraudulent Conveyances (4th Ed.), Sec. 47; 20 Cyc., 485; *Bigelow* v. *Doolittle*, 36 Wis., 115; *Sexton* v. *Wheaton*, 8 Wheat., 229, 250, 5 L. Ed., 603;

"It may be that, in the recent case of *Dokken* v. *Page* (C. C. A.), 147 Fed., 438, involving a sale by a retail merchant of his entire stock of goods, WE GAVE UNDUE PROMINENCE TO THE LANGUAGE OF THE COURT IN *WALBURN* v. *BABBITT;* BUT IT WAS NOT OUR INTENTION TO SAY THAT THE FACT THAT THE SALE WAS OUT OF THE USUAL AND ORDINARY COURSE OF BUSINESS WAS, WHEN TAKEN ALONE, *PRIMA FACIE* EVIDENCE OF FRAUD UNDER THE PRESENT ACT, but only that it was a circumstance which, in connection with the surrounding facts disclosed in the opinion, vitiated the sale there under consideration." (Italics ours.)

From the foregoing decision it will be seen that the learned counsel for the appellees is in error in his contention and statement that the same rule applies under the act of 1898 as applied under the act of 1867. Therefore the above cited cases do not bear out his contention.

The next case cited by counsel for appellees is that of *In re Pease*, 129 Fed., 446, which is one of the early decisions under the present bankruptcy act—having been decided in October, 1902. The facts in this case disclose that the agent of the lender also represented the creditors who were to get the money, and that the whole scheme was to defraud the creditors of Pease. No such facts as existed in that case are even alleged much less

proven in this case. Some parts of this decision are more in support of appellants' contention than they are against same. For instance, that court says:

> "While the *consequence* to Pease's creditors of this action would not defeat the mortgage, if valid, yet they tend to show that the purpose of the lender was not the relief of the mortgagor or the preservation of his business, as he was led to believe, but the contrary." * * * * (Italics ours.)

It was further held in this case as follows:

> "Littman (the creditor) had been persistent in pressing Pease for payment, and when told by Pease, about a week before the mortgage was given, that his efforts to borrow money in Ithaca had failed, assured Pease *that he would get it for him.*"

There is no allegation in the bill nor is there any proof in this case, that Dean acted as or was the agent of the banks, the creditors who got the money he loaned Jones.

The decision in the *Pease case* therefore is not applicable to the facts in this case.

The Circuit Court of Appeals for the Eighth Circuit, in the case of *Powell* v. *Gate City Bank,* 102 C. C. A., 57, holds:

> "* * * * The security given for a present loan is not avoided by the fact that it actually hinders or delays creditors by the withdrawal of the security from application to the payment of their claims, unless it was given WITH AN ACTUAL INTENT to defraud such creditors and the recipient had actual legal notice of that purpose. ACTUAL FRAUD in which the recipient of the lien or security participates is indispensable to the avoidance of a transaction of this nature. *Coder* v.

Arts, 213 U. S., 223, 241-244; *Hiscock* v. *Varick Bank of New York,* 206 U. S., 28."

"* * * * * * There is no transaction so free from dishonesty that the imagination and ingenuity of a mind which searches for them may not find facts and circumstances surrounding it to arouse suspicions it seeks to foster."

In the cases of *Lumpkin* v. *Foley,* 204 Fed., 673, and *Johnson* v. *Dismukes,* 204 Fed., 383, cited by appellees, on page 25 of their main brief, to sustain their contention that the deed of trust in question is fraudulent under Sec. 67-e of the Bankruptcy Act, the attention of this Honorable Court is called to the fact that in both of those cases the facts were similar and both were decided at the same time by the same Judge.

It was held in the one that "the bankrupt was clearly insolvent, the transfer was hastily consummated, that claimant, who was an entire stranger to the bankrupt, made no inquiry or investigation of bankrupt's assets except to take a glance look at the stock" and in the other case that "that fraud, while not to be presumed, may be proved by circumstances as well as by direct evidence and fraud may be actual arising from the facts and circumstances and apparent from the intrinsic nature and SUBJECT OF THE BARGAIN ITSELF."

The facts in those cases are not therefore similar to the facts in the instant case. A reading of the examination in chief of the deposition of Dean, appearing on pages 101 to 112 of the printed record, shows that the said Dean before he loaned the money made a thorough inquiry as to the personal standing, credit, finances and solvency of the said Jones. This was particularly necessary, as Dean had to borrow the money and could not afford to loan it to the said Jones, however urgent his need except upon good security. After such inquiry, and as a result of which he was convinced

of the bankrupt's solvency and his high standing in the community and his excellent credit, for the courts now to hold his deed fraudulent would be a great injustice.

AS TO THE CASE OF *ROBERTS* v. *JOHNSON*.

(Referred to on page 26 of Appellees' brief.)

The first opinion rendered by Judge Smith in this case appears on page 31 of the record and the second appears on page 124. It will be observed from the third paragraph in his second opinion, he says:

> "Nor does the Court find any reason for modifying the conclusions of law found in the opinion filed July 25, 1912, to which reference is now made for a more extended discussion of the principles of law governing this case."

By reference to the last two paragraphs of his opinion filed July 25, 1912, appearing on page 41 of the record, he says:

> "This decision (referring to the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Roberts* v. *Johnson*, 151 Fed., 567) controls this Court, and under the principles as adjudicated by it and the facts admitted in the case at bar, the demurrer must be overruled. The stipulation of counsel in the letters submitted contemplating this hearing as a final hearing a formal judgment will be entered overruling the demurrer and setting aside the deed of trust."

The facts in the *Roberts case*, are easily differentiated and are not similar to the facts involved in this case, and the findings of Judge Smith being influenced by an erroneous view of the law, he erred in deciding this case on the principles and facts involved in that case

In the case of *Johnson* v. *Roberts, supra*, "A bill had been filed by the trustee of the bankrupt's estate to set aside certain mortgages on the ground that they were made with intent to hinder, delay and defraud creditors. It appeared that the bankrupt owed a debt to a manufacturer who was pressing for payment. A brother of the CREDITOR, who was employed by him, referred the bankrupt to another brother who had no business connection with the creditor, but who agreed to make a loan to be secured by a mortgage of practically all the bankrupt's property. The loan slightly exceeded the amount of the debt. As soon as the transaction was consummated and the mortgage executed the Bankrupt paid the creditor out of the proceeds of the loan. The bankrupt was insolvent at the time, and eight days later filed his voluntary petition in bankruptcy. * * * * The Circuit Court set the mortgage aside and its judgment was sustained by the Circuit Court of Appeals. It was sustained on the ground that that *if the mortgagee knew or should have known that the effect of the transaction was to give a preference to the creditor then the mortgages were within the prohibition of the bankrupt act* and the Circuit Court of Appeals having so found notwithstanding the denial of the mortgagee and the circumstances supporting this finding the Court of Appeals should affirm the judgment."

We respectfully submit that the principle of law laid down in the above case is unsound and has long since been overruled by the Circuit Court of Appeals that decided same, and by the decisions of this Honorable Court in the following cases:

In *Coder* v. *Arts*, 213 U. S., 223, this Court held:

"The mere fact that one creditor was preferred over another, or that the conveyance might have the

effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid a conveyance."

In *Van Iderstine* v. *National Discount Co.*, 227 U. S., on page 582, this Court says:

> "It is therefore not in itself unlawful to prefer nor *fraudulent for one though insolvent to borrow in order to use the money in making a preference.*" (Italics ours.)

In fact, this same Circuit Court of Appeals that decided the *Roberts case*, has overruled the above-mentioned principle of law laid down in that case, in the case at bar, in the following language:

> "* * * * * That case (referring to the *Van Iderstine case*) really holds nothing more than had been previously decided in *Coder* v. *Arts*, 213 U. S., 223, namely, that 67e applies only to *actual fraud* as distinguished from a mere preference, *and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudulent.*" (Italics ours.)

Now as to the facts in that case. Here again we find that the party loaning the money is acting on behalf of the creditor who is to receive same in payment of his debt. No such facts exist in the case at bar. There is no claim that Dean was in any way acting for or on behalf of the banks who received his money. In fact, the Circuit Court of Appeals holds that he was not. Of course, where the lender acts for or on behalf of or as the agent of the creditor under the decision of this Honorable Court in the case of *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575, his security will be held invalid. In the foregoing case, however, this

Honorable Court further holds that the mere knowledge of a lender that the money borrowed is to be applied to an existing debt does not make the security given invalid under Sec. 60-b as an unlawful preference or under 67-e as a fraud. The Circuit Court of Appeals in the case at bar so holds. See its opinion, paragraph 9, on page 141 of printed record.

We respectfully submit therefore that the District Court, in deciding this case, erred in following the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Robert* v. *Johnson, supra,* as the principle of law laid down in that case is unsound and in conflict with the opinion of this court in the case of *Van Iderstine* v. *Discount Co., supra.*

The District Judge having admitted that, in deciding the case at bar, he was controlled by the decision of the Circuit Court of Appeals of the Fourth Circuit in the above-mentioned case of *Roberts* v. *Johnson, supra,* and it now appearing that that decision is unsound and in conflict with the decisions of this Honorable Court, he was thereby influenced by an erroneous view of the law, and therefore, the decrees of the lower courts in this case should be reversed.

AS TO THE CONCLUSIONS OF FACT AND LAW FOUND BY THE DISTRICT COURT.

From a reading of the District Judge's CONCLUSIONS OF FACT and his CONCLUSIONS OF LAW, it will be observed that he does not find as a fact or as a conclusion of law that R. Crawley Jones gave the deed of trust in question with the *intent and purpose* on his part to hinder, delay or defraud his creditors or any of them, but that it was done "to do away with the possibility of criminal proceedings against himself (Jones) by getting possession of certain notes, the endorsements

on which it was rumored were forged, and for the purpose of retiring these obligations so as to get them out of the hands of the holders." (Record, page 127); nor did said Court find as a fact or as a conclusion of law, that there had been any *actual fraud* on the part of either Jones or Dean. (See findings of fact and conclusions of law on pages 124 to 129 of printed record.)

That it is essential to show *actual fraud* in order to invalidate conveyances under Sec. 67-e, is the rule laid down by this Honorable Court in *Coder* v. *Arts*, 213 U. S., 223, 244, and is the view of the textwriters upon this subject. Loveland on Bankruptcy (3rd Ed.), 476; Collier on Bankruptcy (6th Ed.), 562; 1 Remington on Bankruptcy, Sec. 1498.

This Court, in *Coder* v. *Arts, supra* (page 244), said:

> "In dealing with this question this court said, in *Thompson* v. *Fairbanks*, 196 U. S., 516:
>
> "There is no finding that in parting with the possession of the property the mortgagor had any purpose of hindering, delaying or defrauding his creditors or any of them. *Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property under the provisions of section 67-e, of the bankruptcy law.*"

The Court then says:

> "* * * * What we hold is that to constitute a conveyance voidable under Sec. 67-e, *actual fraud must be shown.*" (Italics ours.)

There being no finding of fact that Jones gave the deed of trust with the actual intent and purpose on his part to hinder, delay or defraud his creditors or any of them, or that there has been any *actual fraud* committed on the part of either Jones or Dean, it would seem to be

the duty of this Honorable Court, under the foregoing authorities, to reverse the decree of the said Circuit Court of Appeals affirming the erroneous decree entered herein by the said District Court.

The District Court found as conclusion of law as follows:

> "Third: That the deed of trust or mortgage in this case was made in contemplation of the provisions of the Bankrupt Act, and with intention to defeat the same, *as the affect thereof was to give a preference to the holder of the mortgage in contravention of the prohibition of the Bankrupt Act.*" (Record, p. 128.) (Italics ours.)

We respectfully submit that this conclusion of law, under the authorities of this Court, is erroneous and unsound.

This court in *Coder* v. *Arts, supra,* on page 242, in passing upon this point, said:

> "* * * * * The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment, *was not sufficient to avoid a conveyance;* * * * * * *

This Court, in the same case, takes the following quotation from the case of *Lansing Boiler & Engine Works* v. *Ryerson,* 128 Fed., 701, in which the Circuit Court of Appeals said:

> "* * * * * For it is the well-settled law that a conveyance made in good faith, whether for an antecedent or a present consideration, is not forbidden by such statutes, notwithstanding that the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor."
> "And to the same effect is the decision of the

Circuit Court of Appeals of the Second Circuit in *In re Bloch,* 142 Fed., 674, 676."

This Court, in the case of *Van Iderstine* v. *National Discount Company,* 227 U. S., on page 582, says:

> * * * * * "It is therefore not in itself unlawful to prefer nor *fraudulent for one, though insolvent, to borrow in order to use the money in making a preference.*" (Italics ours.)

The Circuit Court of Appeals for the Fourth Circuit, from which Court this case comes, in this very case in the tenth paragraph of its opinion, which appears on page 142 of the printed record, in commenting on the case of *Van Iderstine* v. *National Discount Co., supra,* concedes this to be the law, in the following language:

> "* * * * * That case really holds nothing more than had been previously decided in *Coder* v. *Arts,* 213 U. S., 223, namely, that section 67e applies only to *actual fraud* as distinguished from a mere preference, and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudlent."

However, this well-established principle and rule of law as laid down by this Honorable Court should have been decisive of this case and while recognized by the Circuit Court of Appeals for the Fourth Circuit it refuses to follow, because as it says, "here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower (it will be noticed the Court does not say as the agent of the creditor who is to get the money) and for his benefit in carrying out the plan of preference." However, if it is not in itself unlawful to prefer nor fraudulent for one *though insolvent* to borrow in

order to use the money in making a preference, how can it be said that such a transaction is made fraudulent just because the borrower acts through an agent in making the preference, when, if he had acted for himself directly, it would not have been fraudulent? As to Dean acting as the agent of Jones in the transaction in question, the Court's attention is called to the fact that there is no allegation in the bill, nor is there any proof in the record in this case that Dean acted as or was the agent of Jones, or that he participated as such for Jones' benefit in carrying out the alleged plan of preference. This point is fully discussed in Appellant's main brief on page 33, 34 and 35.

From the foregoing it would clearly seem that the third conclusion of law reached by the District Court, that the deed of trust in question is fraudulent under Sec. 67e of the bankruptcy act, because the effect thereof was to give a preference, and the decision of the Circuit Court of Appeals affirming the same because Dean it is alleged acted as the agent of Jones in carrying out the plan of preference, are both erroneous, unsound in law and in direct conflict with the decisions of this Court as above indicated, and therefore they should be reversed.

Respectfully submitted,

WYNDHAM R. MEREDITH,
C. V. MEREDITH,
Counsel for Appellant.

INDEX.

Page.

Argument 22
Brief History and Material Facts of Case..... 12
Conclusions of Hon. Henry A. M. Smith 13
Conclusions of Fact 13
Conclusions of Law 19
Discussion of Certain Questions Raised in Appellant's Brief 27

TABLE OF CASES AND AUTHORITIES CITED.

Page.

Dokken v. Page (C. C. A., 8 Cir.) 17 Am. B. R. 228, 147 Fed., 438 .....22, 23
In re Knopf (D. C. S. Car.) 17 Am. B. R. 48, 146 Fed. Rep. 109 22
In re Pease (C. C. A., 6th Cir.) 12 Am. B. R. 66; 129 Fed. 446 24
Johnson v. Dismukes (C. C. A., 5th Cir.) 29 Am. B. R. 686,204 Fed. Rep., 382 25
Lumpkin v. Foley (C. C. A., 5th Cir.) 29 Am. B. R. 673, 204 Fed. Rep. 382 25
Roberts v. Johnson, 18 Am. B. R. 132, 157 Fed. 567.... 26
Tiffany v. Lucas, 18 Wall., 410..... 27
Tilt v. Citizens Trust Co., 200 Fed. Rep. 410..... 33
Van Iderstine v. National Discount Company, 227 U. S. 575 26
Walburn v. Babbitt, 16 Wall. 577..... 22

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 364.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, AND W. P. WELLS, SUBSTITUTED TRUSTEE, APPELLEES.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF BARTLETT ROPER, COUNSEL FOR R. BEALE DAVIS, JR., TRUSTEE, APPELLEE.

This is the same cause in which this court, on November 16, 1914, denied to said appellant a writ of certiorari (Record p. 171). On the 27th day of November, 1914,

after the denial of the said writ of certiorari and after the mandate of the Circuit Court of Appeals, Fourth Circuit, had issued to the District Court of the United States for the Eastern District of Virginia, to-wit, on November 24, 1914, and after appellee's deposit for costs had been returned by the clerk of Circuit Court of Appeals (Record p. 171), Bartlett Roper, as attorney for said R. Beale Davis, Jr., trustee, appellee, presented to said District Court, at Richmond, Virginia, a draft of a decree, to be entered in the matter of R. Crawley Jones, bankrupt, pending in said court, directing the transfer by Joseph P. Brady, clerk of said court, of the sum of $1,634.00, then on deposit in the National State and City Bank, Richmond, Virginia, to the Planters National Bank, of said city, the designated depository of said court for bankruptcy funds. As directed by a former decree entered in said matter of R. Crawley Jones, bankrupt, the said sum of $1,634.00 had been deposited in said National State and City Bank to await the decision of the United States courts as to the validity of a certain deed of trust executed by said R. Crawley Jones, bankrupt, securing to said appellant the payment of the sum of $1,600 and interest, evidenced by four certain notes executed by said bankrupt. (This suit having been instituted by said R. Beale Davis, Jr., trustee, appellee, to test the validity of said deed of trust.)

The said appellant objected to the entry by said court of said decree directing the transfer of said sum of $1,634.00 unless there was inserted therein a clause filing and allowing his claim for $1,600.00 and interest as an unsecured claim against the estate of the said R. Crawley Jones, bankrupt, insisting that he had the right not only to file his claim but also to have the court by said decree allow same as an unsecured claim against the estate of said bankrupt and thereby save him the trouble and expense

of having to appear before the referee in bankruptcy at Petersburg, Virginia.

On December 4, 1914, the said appellant and said Bartlett Roper, attorney for said R. Beale Davis, Jr., trustee, appellee, together appeared before the Hon. Edmund Waddill, Jr., judge of said District Court, at Richmond, Virginia, and, after due consideration of the matter, it was then and there distinctly understood and agreed by and between the said Claude M. Dean, appellant, and the said Bartlett Roper, attorney for said trustee, that, if James M. Quick, Jr., attorney at law, of Petersburg, Virginia, who represented one, R. E. Blakey, a large creditor of said bankrupt, had no objection, a clause such as wished by the said appellant would be inserted in the draft of said decree and the decree entered accordingly. At the request of the court, the said Bartlett Roper, attorney, on his return to the city of Petersburg, Virginia, saw the said James M. Quick, Jr., attorney, and promptly notified the court that the said Quick had no objection to the insertion in said draft of decree of a clause such as wished by the said appellant, and said decree, with said clause inserted therein, was accordingly entered by said court as of November 27, 1914. As directed by said decree, the said sum of $1,634.00 was duly withdrawn by said clerk from said National State and City Bank and placed on deposit in the said Planters National Bank, the designated depository of said court for bankruptcy funds, to the credit of said court in said matter of R. Crawley Jones, bankrupt. A certified copy of said decree, marked "A," appears on page 9 of appellee's brief in support of his motion to dismiss the appeal allowed herein.

On the 19th day of December, 1914, another decree was, with the full knowledge and consent of the said appellant, entered by said District Court in said matter of R. Crawley Jones, bankrupt, making certain allowances, out of

said fund of $1,634.00, to the said Bartlett Roper, as attorney for certain petitioning creditors as well as counsel for the said R. Beale Davis, Jr., trustee, appellee, and directing that B. C. Syme, Esq., referee in bankruptcy, at Petersburg, Virginia, formulate and report to court a scheme of distribution of the fund remaining in said Planters National Bank to the credit of the court in said bankruptcy matter. On December 22, 1914, the said Bartlett Roper, attorney, was paid out of said fund of $1,634.00, the amount of the allowances made him by said decree. A certified copy of said decree, marked "B," appears on pages 11 and 12 of appellee's brief in support of his motion to dismiss the appeal allowed herein. The said referee, as directed by said last mentioned decree, after giving the necessary notice, prepared his report, and on the 20th day of January, 1915, the same was duly filed in the clerk's office of said District Court. In said report the said claim of the said appellant is duly reported as an unsecured claim against the estate of said bankrupt.

Several weeks after the above mentioned two decrees had been entered in said matter of R. Crawley Jones, bankrupt, the said appellant made application to this court for an appeal from the decree of the United States Circuit Court of Appeals, Fourth Circuit, entered on February 14, 1914, affirming the decree of the said District Court, invalidating and declaring null and void the said deed of trust executed by said bankrupt, securing to the said appellant the payment of certain notes aggregating the sum of $1,600.00 and interest, and on the 27th day of January, 1915, the said appellant was allowed an appeal by the Hon. Edmund D. White, chief justice of the United States (Record p. 190).

On January 29, 1915, the said Bartlett Roper, attorney, received from the said Claude M. Dean, appellant, the following letter:

"Richmond, Va., Jan. 28, 1915.

Bartlett Roper, Jr., Esq.,
Petersburg, Virginia.
Dean v. Davis, Trustee, etc.

Dear Sir:

I beg to advise you that Chief Justice White has granted me an appeal to the Supreme Court of the United States in the above case and said appeal is to operate as a supersedeas. Please advise me if you will accept service of citation, which as you well know is the usual practice.

Yours very truly,
CLAUDE M. DEAN."

On January 30, 1915, the said Bartlett Roper, attorney, wrote and forwarded to the said Claude M. Dean, appellant, at Richmond, Virginia, the following letter, in reply to the letter received by him:

"ROPER & DAVIS,
Attorneys at Law,
Petersburg, Va.

January 30, 1915.

Mr. Claude M. Dean,
Richmond, Virginia.

Dear Sir:

I have your letter of January 28th advising me that Mr. Chief Justice White had granted you an appeal to the Supreme Court in the case of Davis, trustee, against Dean and you desire me to accept service of the citation.

In reply I would say that I am a little surprised to know that application had been made in this case for an appeal and the same had been granted in view of the fact that on December 4, 1914, over two weeks

after your petition for a writ of certiorari had been denied by the Supreme Court and about ten days after the mandate of the Court of Appeals had issued, you voluntarily appeared with me before the Hon. Edmund Waddill, Jr., judge of the District Court of the United States for the Eastern District of Virginia, and upon your motion a clause was inserted in the decree, directing the fund to be turned over to the bankruptcy court, filing and allowing your claim as an unsecured claim against the estate of said bankrupt. As you will remember, you insisted that you were entitled under our said agreement of September 18, 1909, not only to file an unsecured claim but to have the claim allowed by the court. I offered no objection, but since James M. Quick, Jr., who was not present, and who represented the claim of R. E. Blakey, might have some objection to the filing and allowance of your claim, Judge Waddill fixed a date when he would hear your motion and requested me to notify Mr. Quick to be present if he had any objection to offer. On my return to Petersburg I saw Mr. Quick and notified Judge Waddill that he had no objection to make, so the order with the clause wished by you inserted therein was with your consent as well as mine entered by the judge. A few days thereafter an order was entered in said cause in bankruptcy directing that B. C. Syme, referee in bankruptcy, formulate and report to court a scheme of distribution of the fund, and I understand he has given the required notice and completed his report. This order of reference, as your letter of January 6, 1915, plainly shows, was entered with your knowledge and consent. Further you knew that application had been made by me to Judge Waddill for certain allowances out of the fund as attorney for the petitioning cred-

itors as well as attorney for the trustee in bankruptcy and that said allowances would be made, for I notified you that I would ask for certain allowances out of the fund. You were in his office with me when he asked me about the amount of allowance I wished made and heard me tell him that I would leave the matter entirely with him. What is more the clerk of the U. S. Circuit Court of Appeals on November 24, 1914, returned to me the appellee's deposit of $20, also the taxed attorney's fee. This letter appears to have been dictated by you.

In view of the above facts and particularly in view of our written agreement of September 18, 1909, which appears on pages 14 and 15 of the record, whereby it was agreed between us that the fund 'May be paid over on mutual agreement of the said Claude M. Dean and Bartlett Roper, Jr., attorney as aforesaid,' the decree entered by Judge Waddill, with our consent, directing that the fund be turned over to the bankrupt court for distribution, constituting such a 'mutual agreement,' I would prefer that the citation be served as required by law, for I do not know what effect under the circumstances the acceptance of legal service by me might have on the future proceedings that may arise in this matter.

Yours very truly,
BARTLETT ROPER, JR."

The said attorney has never received a reply to this letter.

On the same day the said Bartlett Roper, attorney, wrote and forwarded to the Hon. Edmund Waddill, Jr., judge of the said District Court, the following letter and enclosed therein a copy of his said letter to the said Claude M. Dean, appellant herein:

"ROPER & DAVIS,
Attorneys at Law,
Petersburg, Va.

January 30, 1915.

Judge Edmund Waddill, Jr.,
Richmond, Va.

My dear Judge:

About the first part of December of last year you entered a decree in the matter of R. Crawley Jones, bankrupt, transferring a certain fund at that time in the National State and City Bank to the Planters National Bank, the regular depository of your court for bankruptcy funds. As you no doubt remember, this decree was held up so to speak by Mr. Claude M. Dean because the same did not contain a provision filing and allowing his claim as an unsecured claim against the said bankrupt's estate. At your request Mr. Dean and I met you by appointment at your office on December 4, 1914, and after discussing the matter, it was distinctly understood and agreed between us that, if Mr. James M. Quick, Jr., who represented the creditor, R. E. Blakey, had no objection, a clause, such as wished by Mr. Dean, would be inserted in the decree and the decree entered by you. At your request, I saw Mr. Quick on my return to Petersburg and notified you that he would make no objection to a clause being inserted in the decree such as wished by Mr. Dean, so the decree was entered after the clause had been inserted. A few days thereafter a decree was entered by you in said matter, with the full knowledge and consent of Mr. Dean, making me certain allowances out of the fund and referring the matter to B. C. Syme, Esqr., referee in bankruptcy with directions to formulate and report to court a scheme of distribution of the

found to the credit of the court in said cause. The referee, acting under said order of reference, gave the required notice and has completed and filed his report.

On yesterday I received a letter from Claude M. Dean advising me that Mr. Chief Justice White had granted him an appeal to the Supreme Court in the case of Davis, trustee, against Dean. After Mr. Dean's petition to the Supreme Court for a writ of certiorari in this case was denied by the court on November 16, 1914, and the mandate of the Court of Appeals had issued, he consented, as you well know, to the entry by you of the decree transferring the fund on deposit in the National State and City Bank, which had been deposited there to await the decision in the case of Davis, trustee, against Dean, to the Planters National Bank, the designated depository of bankruptcy funds, also to the entry of the decree referring the matter to the referee.

I must say I am at a loss to understand Mr. Dean's action in making application to the Supreme Court for an appeal after consenting as he did to the entry by you of the above two decrees in the matter of R. Crawley Jones, bankrupt, and in justice to myself, while the matter is fresh in your memory, I feel that I should bring the same to your attention.

As you wrote me in your letter of December 18, Mr. Dean talked with you regarding the amount of the allowances to be made me out of the fund, insisting that the same should be reduced by one or more taxed attorney's fees paid by him and called your attention to the fact that the fund had lost interest during the past two years.

Since the date the notices were sent out by the referee I have received numerous letters from creditors requesting that I advise them about when they

will receive their dividend in this matter and I am at a loss to know what to write them.

I am herewith enclosing copy of letter received from Mr. Dean, also copy of my reply.

With kindest regards, I am,

Yours very truly,

BARTLETT ROPER, JR."

On or about February 1, 1915, the said Bartlett Roper, attorney, received from the Hon. Edmund Waddill, Jr., judge of said court, the following letter in reply to his said letter of January 30th:

"OFFICE UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF VIRGINIA, RICHMOND.

February 1st, 1915.

Bartlett Roper, Jr., Esq.,
Attorney at Law,
Petersburg, Va.

Dear Bartlett:

I have your letter of [illegible] 30th, enclosing me correspondence bet[illegible] and Mr. Dean, in the Jones case in [illegible] been granted an appeal by the Supr[illegible]ourt.

I can only say [illegible]at the matter comes as a surprise to me, as it certainly does to you, and *all that you say in Mr. Dean's letter and to me regarding the action taken since the mandate of the Circuit Court of Appeals was certified down after the refusal of the certiorari, is correct.* (Italics ours.)

If the bankrupt law is ever made the subject of criticism because of delays that arise therein, it occurs to me this case will afford a fine object lesson.

With kind regards,

Yours very truly,

EDMUND WADDILL, JR.,
United States Judge."

(The original of this letter is filed with the court and use of the same is here made with the consent of the said Hon. Edmund Waddill, Jr.)

The court will note that the facts hereinbefore set out are fully substantiated by the said letter of the Hon. Edmund Waddill, Jr.

It is, therefore, respectfully submitted that the said appellant, having voluntarily, and in a court of competent jurisdiction, admitted the invalidity of the lien claimed by him, after the invalidity thereof had been established by the said decree of the United States Circuit Court of Appeals for the Fourth Circuit, and after a writ of certiorari had been denied him by this honorable court, and having consented to the distribution of the fund on which he theretofore claimed a lien, and filed his claim as an unsecured claim, should not now, in this appeal, be allowed to take a position and make a contention directly opposed to his own actions and admissions, and that he is, and should be, estopped to question the correctness of the said decree appealed from.

Should the court, however, be of the opinion that the said appellant is not estopped to question the correctness of the said decree of the United States Circuit Court of Appeals appealed from, then a discussion of the law and of the facts of this case becomes pertinent.

Time will not permit us to take up and consider separately the appellant's numerous assignments of error, twenty-two in number, which appear on pages 173-187 of the record, so we must to a large extent confine ourselves to a discussion of the law and of the facts as appears from the record, but we will hereafter comment on such of the appellant's assignments of error as we think require any comment from us.

Brief History and Material Facts of Case.

On the 25th day of April, 1910, R. Crawley Jones was adjudged an involuntary bankrupt by the District Court of the United States for the Eastern District of Virginia on the petition of certain creditors filed in said court on December 24, 1909 (Record p. 47). An appeal was allowed said bankrupt, and on the 21st day of December, 1910, the Circuit Court of Appeals, Fourth Circuit, affirmed the action of the said District Court in its said order of adjudication (Record p. 56). At the first meeting of the creditors of said bankrupt, the appellee was duly elected trustee of the estate of said bankrupt and the same day duly qualified as such (Record p. 82). On the 5th day of March, 1912, the appellee filed a suit in said District Court against the said appellant and one W. P. Wells, trustee, for the purpose of testing the validity of a certain deed of trust, dated September 3, 1909, executed by said bankrupt and his wife to one E. C. Dean, trustee, who was the father of said petitioner, securing to said appellant the payment of four certain notes made by said bankrupt aggregating the sum of $1,600 and interest (Record p. 2, *et seq*). On the 4th day of May, 1912, the said appellant filed a demurrer to appellee's bill (Record pp. 29 and 30), and, after due hearing, the court, on the 25th day of July, 1912, filed its decree overruling said demurrer, invalidating said deed of trust and declaring the same null and void under the provisions of the bankruptcy act—the court having understood from the stipulations of counsel and statements made by counsel at the bar of the court that the decision on the demurrer should be a final determination of the matters at issue (Record pp. 31, 46). Later, to-wit, on September 28, 1912, on claim being made by the said appellant and his counsel that the court had misunderstood the scope and intent of said stipulations, and they had been taken by surprise, the court filed another decree modifying its former

decree of July 25, 1912, so as to limit it only to a decree overruling said demurrer, and in said decree directed that said appellant answer the bill of complaint on or before the second Monday in October, 1912, or, in default thereof, that the bill be taken *pro confesso* (Record pp. 42-47). On the 14th day of October, 1912, the said appellant filed his answer to said bill (Record p. 47), to which said answer the appellee filed a general replication (Record p. 134) and testimony in support of the allegations of said bill and answer was duly taken (Record pp. 58-123).

On the 15th day of February, 1913, this cause was heard on the pleadings and testimony, and on the 14th day of April, 1913, the learned judge of said court, Hon. Henry A. M. Smith, United States district judge for South Carolina, designated to sit in the Eastern District of Virginia, found the following conclusions of fact and law:

CONCLUSIONS OF FACT.

"1. On September 1st, 1909, R. Crawley Jones, the bankrupt, was insolvent, and being insolvent wrote the following letter to the defendant Claude M. Dean, who was his brother-in-law, the said R. Crawley Jones having married the sister of the said Claude M. Dean:

Darvills, Va., Sept. 1st, 1909.

Dear Claude:

I am in serious trouble and need your help at once badly, being charged with a very grave offense under the law, and if arrested for same, although I afterwards prove myself innocent, it would be a disgrace to me and my family. If I can get hold of $1,600.00 in cash I will be saved, so for God's sake loan it to me and save my wife and child from disgrace. If you will do this I will give you notes for the amount and a deed of trust on everything

I have or possess to secure you. All I need is a little time, for I have enough to more than pay you five times over again. It is absolutely necessary that I have this money at once. As soon as I quiet this matter up I will see you and explain all. Please do this for me and my family at once, for I have no time to lose or explain further. Find notes inclosed for the amount and as soon as you prepare deed of trust I will sign same.

Sincerely yours,

R. C. JONES.

"2. That at the date of writing the said letter or prior thereto the said R. Crawley Jones was threatened with or under apprehension of criminal prosecution concerning certain endorsements on notes made by the said R. Crawley Jones and purporting to bear the endorsements of certain persons, which endorsements were claimed or alleged to be not genuine. Some of these notes were at that date held by the Virginia National Bank of the city of Petersburg, some of them being not yet due.

3. This letter was delivered to Claude M. Dean by J. Samuel Jones, the father of R. Crawley Jones, on the 2nd of September, 1909, and the said J. Samuel Jones at the time of the delivery of the letter to Claude M. Dean gave him further information as to the threatened or impending criminal prosecution against R. Crawley Jones for charges connected with the endorsements upon these notes, and at the same time gave him information as to the financial condition of R. Crawley Jones. Thereupon Claude M. Dean informed J. Samuel Jones that he would make arrangements to raise the money the next day if the bank would agree to payment then, which information was to be ascertained

by Mr. J. Samuel Jones and telegraphed to Claude M. Dean that day, which was done.

"4. On the 3rd of September, 1909, Claude M. Dean raised the money and met J. Samuel Jones in Petersburg. Thereupon the two first went to a bank in Petersburg, where certain notes of the same character were paid by money advanced by J. Samuel Jones, and then they went together to the Virginia National Bank of Petersburg, where to the $1,600.00 furnished by Mr. Dean there was added enough by Mr. J. Samuel Jones to take up the notes with the questionable endorsements held by the Virginia National Bank. The notes taken up at the Virginia National Bank were not marked paid, but were delivered to Claude M. Dean when the money was paid and by him some time afterwards handed over to R. Crawley Jones.

"5. On the 3rd of September, 1909, Mr. Claude M. Dean, before the notes were taken up, had certain conversations with the cashier of the Virginia National Bank of Petersburg. What was the tenor of these conversations is a matter of contradiction in the testimony between Mr. Dean and the cashier, Mr. Long, but as the determination of the correctness of the conversations stated by either is not in the court's opinion necessary for the decision of this case no conclusion of fact dependent upon the conflicting testimony of the two is found thereon.

"6. After the retirement of the notes Mr. Dean prepared a deed of trust by way of mortgage to be signed by R. Crawley Jones to secure the notes stated in his letter dated September 1st, 1909, amounting to $1,600.00. These notes were four in number, all dated the 1st day of September, 1909, payable, respectively, at seven, thirty, sixty and ninety days after date. On the non-payment of any

note at maturity all the others became at once due and payable. The first note was for $100.00, and matured on the 10th September, 1909. The other notes were for $500.00 each. On the 10th of September, 1909, the deed of trust prepared by Mr. Claude M. Dean to be signed by R. Crawley Jones was executed by R. Crawley Jones and his wife. It was dated the 3rd of September, 1909. This deed of trust covered the entire property of R. Crawley Jones—viz., it covered all his household goods and furniture, all his kitchen furniture, all his live stock, all his crops growing and cut, all his stock of goods and merchandise, all his store fixtures and furniture, all his accounts and bills receivable, and all his landed property. The trustee named in the deed of trust was Mr. E. C. Dean, the father of Mr. Claude M. Dean.

"7. On the 11th September, 1909, Claude M. Dean, the first note not having been paid, directed the trustee under the deed of trust by way of mortgage to take possession of the property covered by the mortgage and proceed to execute the same, and the trustee thereupon took possession on the 13th September, 1909.

"8. Thereafter by agreement the defendant, William P. Wells was substituted as trustee under the deed of trust in lieu of Mr. E. C. Dean, upon agreement that he should hold the proceeds of sale of the mortgaged property subject to the determination of the court as to the validity of the deed of trust.

"9. On the 24th December, 1909, a petition for involuntary bankruptcy was filed against R. Crawley Jones, which was resisted by him, but on which he was subsequently on the 25th April, 1910, adjudicated bankrupt, and it appeared that he was in-

solvent both on the 1st of September, 1909, and thereafter.

"10. The substituted trustee, William P. Wells, disposed of the property covered by the deed of trust, which realized the sum of $1,634.00, which is held to meet the result of this litigation and practically represents the entire bankrupt estate.

"11. That the bankrupt, R. Crawley Jones, on the 1st of September, 1909, knew that he was insolvent, and knew that the Virginia National Bank of Petersburg held notes of his upon which he was liable to criminal prosecution by reason of charges concerning the endorsements thereon, and was entirely convinced of the necessity of the retirement of these obligations so as to get them out of the hands of the holders and do away with the possibility of criminal proceedings against himself based upon them.

"12. That Claude M. Dean before furnishing the $1,600.00 made no investigation of the affairs of R. Crawley Jones beyond the conversation had by him with J. Samuel Jones, the father of R. Crawley Jones, and the conversations had by him with John W. Long, the cashier of the Virginia National Bank of Petersburg, the tenor of which is the subject of the conflict of testimony between Mr. Long and Mr. Dean.

"13. That Claude M. Dean desired to assist R. Crawley Jones, the bankrupt, who was his brother-in-law, and to rescue him from the disgraceful exposure which threatened him, and for that purpose consented to furnish the money which was sought of him to be advanced.

"14. That Claude M. Dean, under the circumstances at the time of the appeal to him to advance the money, had reasonable cause to believe that R.

Crawley Jones was then insolvent and that by reasonable examination of the affairs of R. Crawley Jones, if such examination had been made at the time, he would have been able to ascertain that R. Crawley Jones was in fact then insolvent.

"15. That Claude M. Dean knew that the effect of giving the mortgage to him and the use of the money lent by him to pay the notes held by the bank would be to retire those notes in full, which were obligations held by existing creditors, leaving to all other creditors only what might remain out of the proceeds of all the property of R. Crawley Jones after the payment in full under the mortgage of the amount loaned by Claude M. Dean to retire those existing notes upon which were the questionable endorsements.

"16. That some of the stock of goods and merchandise mortgaged to Claude M. Dean, the sale of which constitutes a portion of the proceeds of the mortgaged property, consisted of goods furnished by unsecured creditors, which goods had not been paid for and which creditors are now among the unsecured creditors of the bankrupt.

"17. That Claude M. Dean knew that the money loaned by him would be applied to the payment of existing debts, not in the ordinary course of business, but for the purpose of enabling R. Crawley Jones to avoid an apprehended criminal prosecution" (Record pp. 124-128).

CONCLUSIONS OF LAW.

"*First:* That Claude M. Dean must be presumed to have been aware under the facts in this case that the result of the application of the loans made by him to the retirement of those notes would be to

substitute for existing unsecured debts the debt then incurred to him, giving it a priority for the purpose of accomplishing a particular result, to-wit, the retirement of existing unsecured debts upon which his brother-in-law was liable to criminal prosecution and the substituting therefor of another debt to him for the payment of which all his brother-in-law's property was mortgaged.

"*Second:* That when he accepted this mortgage Claude M. Dean under the facts must be presumed to have known that it was made in contemplation of the provisions of the bankrupt act in that it was intended to operate, and actually operated, to accomplish something which was forbidden by that statute, to-wit, the substitution of a secured debt for and in the place of an unsecured debt which it was desired to pay in full so as to avoid criminal prosecution.

"*Third:* That the deed of trust or mortgage in this case was made in contemplation of the provisions of the bankrupt act, and with intention to defeat the same, as the effect thereof was to give a preference to the holder of the mortgage in contravention of the prohibition of the bankrupt act" (Record p. 128).

In addition to the foregoing conclusions of fact found by the court, the testimony in the record shows that on September 3, 1909, the date the notes held by the Virginia National Bank were taken up and turned over to the petitioner unstamped, some of said notes were not due (Record p. 66); that prior to the date the said appellant and J. Samuel Jones went to the banks in the city of Petersburg, Virginia, and took up said notes the said appellant knew that the bankrupt's stock of goods had not been fully paid for (Record p. 105); that while the said appellant

stated in his evidence that he had no knowledge of the prior deed of trust to J. M. Quicke, Jr., trustee, executed by said bankrupt on his farm, until the 10th day of September, 1909, the said deed of trust to E. C. Dean, trustee, which he states was prepared by him on September 3, 1909, on his return to the city of Richmond, refers in terms to this prior deed of trust (Record pp. 12 and 50); that while the said deed of trust is dated September 3, 1909, the date the notes were taken up at the banks in Petersburg, and on its face purports to have been signed and acknowledged by said bankrupt and his wife on that date, it is admitted by the appellant (R. p. 108), and testified to by the notary who signed the certificate of acknowledgment, that the said deed of trust was neither signed nor acknowledged by the parties thereto until the 10th day of September, 1909, a week thereafter—the notary further stating that he carelessly signed the said certificate without reading it over, relying on the appellant, who was doing the writing, that the same was filled in correctly, the appellant telling him that he had just to sign his name (R. pp. 72 and 73); that J. Samuel Jones, the father of said bankrupt, who went with said appellant to the Virginia National Bank at the times the notes were taken up, was one of the endorsers on the said notes of said bankrupt held by said bank, and was anxious that said notes be taken up not only to prevent criminal proceedings against his son, but also to relieve himself of any financial embarrassment growing out of his endorsements on said notes (R. p. 66); that the said bankrupt listed in his bankruptcy schedules property of very little, if any, value (Exhibit X); that at the first meeting of the creditors of said bankrupt unsecured claims amounting to $5,394.08 were filed and allowed by the referee (R., p. 83), and that the creditors filing said claims were principally merchants who had sold the said bankrupt merchandise for the conduct of the retail merchandise business conducted by him (R. p. 80), and that a great many of the

goods of said merchants, which had not been paid for, were in said storehouse and were included in said deed of trust (R. p. 80); and that prior to the execution of the said deed of trust of September 3rd the said bankrupt had in his possession, made out in his own handwriting, a complete list of his unsecured creditors, from which said list it appears that his creditors numbered forty-nine, with an aggregate indebtedness of $7,665.86, which amount did not include the sum of $1,600.00 and interest claimed to be secured by the said deed of trust in controversy (R. pp. 81 and 82).

The learned judge of the District Court, on the above conclusions of law and fact found by him, adjudged, ordered and decreed that the said deed of trust of September 3rd, 1909, was invalid under the provisions of the bankruptcy act, and set aside, vacated and declared the same null and void.

On the 10th day of May, 1913, the said appellant filed a petition for an appeal, also an assignment of errors, and on the same day was allowed an appeal to the Circuit Court of Appeals, Fourth Circuit. (R. pp. 129, 134.) The said Circuit Court of Appeals at its November term, 1913, heard said appeal, and at its February term, 1914, rendered its decision, affirming the decree of the District Court appealed from—the said court being of the opinion that the said deed of trust of September 3rd, 1909, executed by said bankrupt and his wife, was invalid not only as in fraud of creditors, under section 67-e of the bankruptcy act, but also as a preference under section 69-b of said act. (R. pp. 138-143.)

On the 16th day of April, 1914, the said appellant filed a petition for a rehearing, which said petition, after due consideration by the court, was, on the 13th day of June, 1914, denied, and on the same day the mandate of the court was stayed pending an application by the said petitioner in this honorable court for a writ of *certiorari*. (R. pp. 147, 169 and 170.)

The said appellant then filed in this court a petition for a writ of *certiorari*, and, on the 16th day of November, 1914, the same was denied. (R. p. 171.) On the 27th day of January, 1915, the said appellant filed his petition praying for an appeal, and on the same day was allowed an appeal to this court by the Hon. Edward D. White, Chief Justice of the United States. (R. pp. 171 and 190.)

ARGUMENT.

We will now consider briefly the law bearing on the facts as disclosed by the record, and see what has been the ruling of the courts in cases involving a similar state of facts.

Under the act of 1867 all transfers OUT OF THE DUE COURSE OF TRADE were PRIMA FACIE EVIDENCE OF FRAUD and the same rule applies under the Act of 1898;

Walburn v. *Babbitt*, 16 Wall., 577;
In re Knopf (D. C. S. Car.), 17 Am. B. R., 48, 146 Fed. Rep., 109;
Dokken v. *Page* (C. C. A., 8 Cir.), 17 Am. B. R., 228, 47 Fed., 438.

In the case of *In Re Knopf, supra*, Judge Brawley, citing with approval the case of *Walburn* v. *Babbitt*, held that a transfer by a retail merchant of his entire stock of goods is not a sale in the usual course of trade, but is PRIMA FACIE FRAUDULENT and imposes upon the purchaser the active duty of inquiring into the vendor's financial situation.

In the case of *Walburn* v. *Babbitt* (*supra*) Mr. Justice Davis says "where a retail merchant in a small country town sells his entire stock to one person, it is *prima facie* fraudulent sale under the bankrupt act although full value be paid. *The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome*

by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller." (Italics ours.)

In the case of *Dokken* v. *Page* (C. C. A., 8th Cir.), 17 Am. B. R., 228, 147 Fed., 438, before Van Devanter, Adams and Phillips, Judge Phillips, referring to the case of *Walburn* v. *Babbitt*, says: "The pronouncement of the Supreme Court in *Walburn* v. *Babbitt*, 16 Wall., 577, as applied to the facts of the case at bar, has ever since been the recognized rule of law and has been repeatedly followed on the circuits under the present Bankruptcy Act." Quoting from *Walburn* v. *Babbitt*, Judge Phillips says: "But it is a wholly different thing when he sells his entire stock to one or more persons. This is *an unusual occurrence*, out of the ordinary mode of transacting such business, is *prima facie* evidence of fraud and throws the burden of proof on the purchaser to sustain the validity of his purchase." (Italics ours.)

The proofs in the case at bar show that the said deed of trust executed by said bankrupt embraced and covered all of his property of every kind and description, namely, (1) his household and kitchen furniture, each item thereof being specifically named and enumerated, (2) certain live stock consisting of two cows, 1 yearling and 9 head of hogs, (3) growing crops of corn and tobacco, tobacco already cut and corn on the premises, (4) stock of goods and merchandise in his store house at or near Darvills, in Dinwiddie county, Va., consisting of dry goods, notions, boots, shoes, hats, hardware, lard, sugar, coffee and meat, (5) fixtures in said storehouse consisting of counters, show cases, iron safe and two National Cash Registers, (6) debts due said bankrupt as well as all open accounts, and (7) equity in a certain tract of land in Dinwiddie County, Va., containing 201 acres, said land being subject to a prior deed of trust to J. M. Quicke, Jr., trustee, securing the sum of $3,000.00 and interest due R. E. Blakey (R., 11-14).

A case almost identical with the case at bar is the case of *In re Pease*, (C. C. A., 6th Cir.), 12 Am. B. R., 66; 129 Fed., 446.

Judge Swan, in his opinion delivered in the above case, says:

> "One actually insolvent has no equitable interest in what is only nominally his property. The effect of his transfer is to hinder, delay, and defraud his other creditors without the hope or possibility of benefiting himself. The reasons for sustaining a sale or security given by one commercially insolvent in the effort to save his business and avoid bankruptcy have no application to one who has lost everything, and who by a sale or mortgage of his property necessarily withdraws it, in whole or in part, from the reach of creditors. Both lender and borrower are chargeable with knowledge of the obvious effect of the transactions upon unsecured creditors, and with colluding to defeat the Bankrupt Act, if the insolvent seasonably becomes a bankrupt. Had the Security Trust Company in this case been a pre-existing creditor of Pease its security for its debt would have been indefensible. It is equally so when it ignored the means of knowledge of the grantor's hopeless insolvency, and knowing that the money was to be used to pay unsecured pre-existing debts. A loan of that character is not sanctioned by the reasoning in either *Tiffany* v. *Boatman's Inst., supra*, or *Tiffany* v. *Lucas*, 15 Wall., 410-424, in neither of which was the vendor known to be even commercially insolvent. It seems clear from these considerations that, although a present consideration passed to Pease for the mortgage, the avowed purpose and necessary effect of the transaction, under the facts in this case, deny to the mortgagee the character of a purchaser in good faith."

The facts in the case of *Lumpkin* v. *Foley*, (C. C. A., 5th Cir.), 29 Am. B. R., 673, 204 Fed. Rep., 372 (decided April, 1913), are very similar to the facts in the case at bar.

Judge Sheppard in delivering the opinion of the court, says:

> "Although the transfer to the said Lumpkin was for a present fair consideration, the said claimant, Lumpkin, was not a purchaser in good faith and that the transfer to him was void under section 67e of the bankruptcy act; and that fraud, while not to be presumed, may be proved by circumstances as well as by direct evidence and fraud may be actual arising from the facts and circumstances and apparent from the intrinsic nature and subject of the bargain itself."

The facts in the case of *Johnson* v. *Dismukes* (C. C. A., 5th Circuit), 29 Am. B. R., 686, 204 Fed. Rep., 382, are also very similar to the facts in the case at bar.

Judge Sheppard, in delivering the opinion of the court, lays down the law as follows:

> "Where bankrupt mortgaged his entire stock of goods and used the proceeds to pay his bank and kinsmen debts due them, and it appeared that at the time bankrupt was clearly insolvent, that the transaction was hastily consummated, that claimant, who was an entire stranger to bankrupt, made no inquiry or investigation of bankrupt's assets except to take a glance look at the stock, and that reasonable inquiry would have revealed to him bankrupt's insolvency and his intention to hinder and delay, if not to defraud, his general creditors, the mortgage was void under section 67e of the Bankruptcy Act." Quoted from syllabus of case.

The decision of the Circuit Court of Appeals, Fourth Circuit, in the case of *Roberts* v. *Johnson,* 18 Am. B. R. 132, 157 Fed. 567, involving a similar state of facts, is in line with the above cited cases.

We will not comment on the numerous cases cited by appellant in his brief further than to say that in none of them were the facts at all similar to the facts in the case at bar.

Since the appellant in his brief places such strong reliance on the case of *Van Iderstine* v. *National Discount Company,* 227 U. S. 575, decided by this court February 24th, 1913, we will comment briefly on the facts in this case.

Judge Woods, who delivered the opinion of the Circuit Court of Appeals in the case at bar, in commenting on the *Van Iderstine case,* says:

> "That case really holds nothing more than had been previously decided in *Coder* v. *Arts,* 213 U. S. 223, 22 Am. B. R. 1, namely, that section 67-e applies only to actual fraud as distinguished from a mere preference, and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudulent. But here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower and for his benefit in carrying out the plan of preference, which it was obvious would result in closing the business of the debtor." (See opinion R. pp. 138-143.)

In the *Van Iderstine case* the bankrupts borrowed certain sums of money on certain of their book accounts, and the record in the Circuit Court of Appeals shows that at that time the bankrupts had other property and were rated as being worth from $50,000 to $75,000 (23 Am. B. R.

345); that it was doubtful if the bankrupts intended to defraud, but if they did the National Discount Company did not know thereof and was not charged with knowledge by any of the circumstances surrounding the transaction. In the case at bar the bankrupt, who was a retail merchant conducting a general retail merchandise business at a cross-road store near Darvills, in Dinwiddie county, Virginia, made a transfer of all his property of every kind and description, including his stock of goods and fixtures, which property when sold by the trustee produced a net amount just a little in excess of the amount of the four notes held by said appellant and secured by the said deed of trust. The proofs also show that the said appellant knew or was charged with knowledge of the bankrupt's fraudulent intent and purpose in making said transfer.

There is a line of cases, following the doctrine laid down by this court in the old case of *Tiffany* v. *Lucas*, 18 Wall. 410, sustaining liens given by an insolvent debtor, in good faith, for a present consideration and for the purpose of enabling him to CONTINUE his business, but we respectfully submit that no case can be found upholding and sustaining liens given by an insolvent debtor where the evident purpose and effect of the execution of the lien would be to destroy his business, which the record plainly shows was the purpose and intent of the debtor in the case at bar, the appellant having full knowledge of said intent.

Discussion of Certain Questions Raised in Appellant's Brief.

The following language appears on page 9 of appellant's brief:

> "The bill sets out only one ground for setting aside the deed of trust of September 3, 1909. That was that it had been given by Jones with intent to

> prefer Dean over his other creditors of the same class. The prayer of the bill was that the deed for that reason might be set aside and declared void."

The appellant is clearly in error in the above statement. A reading of the bill will plainly show that facts are alleged therein and proven which show conclusively that the said deed of trust was made by said bankrupt and accepted by said appellant in violation of the provisions of Section 67-e of the Bankruptcy Act, and the court was fully warranted from the facts alleged and proven in drawing the conclusion of law that the said deed of trust was so made and accepted. We have never considered it the proper practice to charge that an act was done with intent to hinder, delay or defraud. The proper practice, as we understand it, is simply to state the facts necessary to show the fraudulent intent. Whether said deed of trust was made with the intent to hinder, delay or defraud his creditors was a conclusion of law to be drawn by the court from the facts alleged and proven. The bill contained a prayer for general relief, so it was clearly within the province and jurisdiction of the court to grant to the said complainant such relief as the facts alleged and proven warranted.

Appellant on page 14, of his brief says:

> "We respectfully submit that at the time of the giving of the deed of trust in question Jones was not insolvent, and even if he was, it has not been shown that Dean had reasonable cause to believe him insolvent."

In the first place, the insolvency of the said Jones at the time the said deed of trust in question was given was a matter directly at issue and passed on by the court when the Circuit Court of Appeals affirmed the action of the District Court in adjudicating him an involuntary bank-

rupt and we submit that the same is no longer an open question.

Loveland in his admirable work on bankruptcy at page 558, says:

> "The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition. But when the question of insolvency is adjudged in determining the act of bankruptcy *in an involuntary proceeding*, the fact of insolvency at the date the act was committed may be taken by the adjudication." (Italics ours.)

Granting for the sake of argument that the insolvency of the said R. Crawley Jones on September 3, 1909, is not *res adjudicata*, it is respectfully submitted that the proofs in the record in this cause show conclusively that the said bankrupt was on the 1st, 3rd and 10th day of September, 1909, and for sometime prior thereto hopelessly insolvent, insolvent to such an extent that he must have known of his insolvency. The statement, which appears on page 25 of appellant's brief, is not a correct and fair statement of the assets and liabilities of said bankrupt. In said statement the farm is put down at $5,000.00. There is no legitimate evidence in the record to warrant any such value being placed on this farm and the same is merely guess work on the part of said appellant. This farm was assessed for taxation on the land books of Dinwiddie county for the year 1910 at the sum of $1,203.00 (R., 120) and when sold by James M. Quicke, Jr., trustee under a certain deed of trust from said bankrupt and wife, brought the sum of $2,920. In said statement the stock of goods and fixtures are put down at $3,000.00, although the same inventoried only the sum of $2,607.76 (R. 76) and a lot of the goods were worthless and had been in the stock of several merchants who had previously conducted the merchandise busi-

ness at the same stand (R., 79). In said statement accounts due said bankrupt are put down at $500.00. The undisputed evidence in the record is that of these said accounts $193.76 were worthless (R., 75). In said statement certain personal property on the farm is put down at $534.25. The undisputed evidence in the record is that when this personal property and the farm were sold by J. M. Quicke, Jr., trustee, enough was not realized therefrom to discharge in full the debt to R. E. Blakey, the beneficiary in said deed of trust (R., 60.) In said statement the corn, tobacco and pea crop is put down at $1,000.00. This valuation is based on the hearsay evidence of appellant (R., 111). It will be noted that said appellant in his testimony admits that he has never had any experience as a farmer, and so far as the record goes appellant had little or no knowledge of the value of the farm and the crops and other property thereon and had only visited the farm once and that was on September 10, 1909, when he went to get the said bankrupt to sign the deed of trust,—hence the above valuation is purely guess-work on his part (R., 50, 105 and 111). W. P. Wells, substituted trustee, who took charge of the crops on the farm, harvested and disposed of the same, states that he was only able to realize the sum of $210.00 therefrom (R., 74), and said substituted trustee further states that it was necessary for him to dispose of all the property mentioned in said deed of trust, except certain household and kitchen furniture, store accounts, which were turned over by him to said bankrupt on the advice of said appellant, and the alleged equity in said farm, in order to realize the net sum of $1,632.00, the amount of the notes given the said appellant by said bankrupt and interest thereon (R., 73 and 74). In said statement household and kitchen furniture are put down at $800.00 This valuation is based solely on the testimony of said appellant who, as stated above, had little or no knowledge of the value of the farm and the property located thereon. If the bankrupt had

household and kitchen furniture to the value of $800.00, it is somewhat strange that he failed to list same in his bankruptcy assets. An inspection of his bankruptcy schedules will show that he listed property of very little, if any, value, the property listed by him consisting only of certain worthless store accounts aggregating $193.76, five shares of stock of the Bank of Scottsburg, of the par value of $250.00, on which the said bankrupt had secured a loan of $250.00, practically its market value, two cash registers, valued at $150.00 and certain wearing apparel claimed by him as exempt under Poor Debtor's Law. No mention of household and kitchen furniture appears in his schedules. Surely if he had household and kitchen furniture of such value he would have listed same in his bankruptcy schedules and we can but infer that he had no such furniture. (Exhibit "X" certified up to Circuit Court of Appeals under stipulation of counsel.) In said statement the unsecured debts due by said bankrupt are put down at $5,394.08. According to a statement made out and in the possession of the said bankrupt prior to the execution of said deed of trust, (said statement being in the handwriting of said bankrupt) his unsecured indebtedness amounted to the sum of $7,665.80 instead of $5,394.08 (R., 80, 81 and 82). In said statement the amount due on said farm is put down at $3,000.00, when the correct amount due according to the testimony of J. M. Quicke, Jr., the trustee in said deed of trust on said farm, is $3,097.00 (R., 60). In addition to the above indebtedness there was his indebtedness to said appellant of $1,600.00 and interest, making a total indebtedness, not to mention the interest due on his many merchandise bills, of $12,362.86 instead of $10,834.25 as appears in appellant's brief. The said bankrupt listed in his bankruptcy schedules unsecured debts amounting to the sum of $7,515.73 which did not include the debt of $1,600.00 due appellant. (Exhibit "X.")

It is, therefore, respectfully submitted that, according to appellant's own statement in his brief, admitting as correct the fictitious values placed by him on the bankrupt's property, the said R. Crawley Jones was insolvent on September 3, 1909, and for sometime prior thereto.

We will now examine the proofs in the record and see whether the said appellant, at the time the said deed of trust was executed, had reasonable cause to believe the said bankrupt insolvent.

The proofs show that he knew that the said bankrupt was very much concerned about certain bogus notes held by certain banks in the city of Petersburg on which he was threatened with criminal prosecution, and on which his father, the said J. Samuel Jones, was liable as endorser; that in order to raise the required amount of money for the purpose of taking these bogus notes and in that way get in his possession all evidence of his crime and relieve his father's endorsement on said notes, he was willing to give him a deed of trust on "EVERYTHING" he had or possessed (R., 100); he knew that the bankrupt was at that time engaged in the general merchandise business at Darvills in Dinwiddie county and in the conduct of such business carried a varied stock of general merchandise (R., 101), which said stock of merchandise, together with the store fixtures, the said bankrupt was willing to mortgage if he could only get the necessary amount of money to take up said bogus notes, so to speak (R., 101 and 102); he knew that the bankrupt's stock of goods at Darvills had not been fully paid for, for J. Samuel Jones, the father of said bankrupt, told him so on his visit to appellant on September 2, 1909, (R., 105); he also had constructive, if not actual, notice that the farm was mortgaged to James M. Quicke, Jr., to secure one R. E. Blakey the payment of certain notes aggregating the sum of $3,000.00 and interest. On the 20th day of February, 1909, several months prior thereto, the said bankrupt had executed a deed of trust to James M.

Quicke, Jr., trustee, and the same had been recorded in Dinwiddie County on March 31, 1909 (R., 59); he knew from his letter that said bankrupt, who was his brother-in-law, had no one else from whom he could hope or look to for help in order to extricate himself from the awful position in which he had placed himself, and his pitiable appeal showed his awful plight and condition and his willingness to do almost anything with his property, regardless of the rights of his other creditors, in order to secure the money he needed to get possession of the bogus notes held by the banks in Petersburg; as a reasonable business man he knew that the said bankrupt could not give him a deed of trust on "EVERYTHING HE HAD," including his stock of goods and fixtures, to secure the notes sent him in his letter, and still continue to conduct his merchandise business at Darvills. Surely, as was said by Judge Cross in *Tilt* v. *Citizens Trust Co.*, 200 Fed. Rep. 410, (C. C. A., 3rd Cir.), the above facts were sufficient to have incited or caused the appellant, as a man of ordinary prudence, before making the loan, to have inquired diligently into the financial condition of said bankrupt.

The said deed of trust not having been actually executed until the 10th of September, 1909, at that time one of the notes secured thereby was already due which caused all of the notes to become due. The said deed of trust was admitted to record on Saturday, September 11, 1909, (R., 14) and on that same day, which was the very next day after the execution thereof, the said appellant directed his father, E. C. Dean, the trustee named in the said deed of trust, to take charge of the property and dispose of the same in accordance with the terms and provisions thereof (R., 109). On Monday, the 13th, the 12th being Sunday, the said E. C. Dean, trustee, in accordance with the directions of his son, the said appellant, took charge of the property mentioned in said deed of trust and proceeded to dispose of the same (R., 109). About a week or ten days

later, under an agreement between appellant and the attorney for certain creditors of said bankrupt, W. P. Wells was substituted as trustee in the place of the said E. C. Dean and disposed of all the property embraced in the deed of trust with the exception of an alleged equity in said farm, household and kitchen furniture, and certain store accounts which were turned over by him to the said bankrupt on the advice of the said Claude M. Dean (R., 74 and 57). Nothing was realized from the equity in the land and the personal property, for when same was sold by J. M. Quicke, Jr., the trustee in the prior deed, enough was not realized from the sale thereof to discharge in full the debt due R. E. Blakey secured thereby (R., 60).

At this point certain significant questions arise which cause doubt as to the position taken by appellant in his brief that at the time he made the loan and accepted said deed of trust he thought the said bankrupt was solvent, and in a prosperous financial condition, and had more than enough to pay everybody he owed. The first question that arises is: If he thought the said bankrupt, who was his brother-in-law, solvent and in a prosperous financial condition, why was he in such a hurry to sell him out—why did he on the very next day after the deed of trust was executed and on the very day the same was admitted to record in the clerk's office of Dinwiddie county direct his father, the trustee, to take charge and dispose of the property covered thereby? Was appellant so hard pressed for money and needed the money so badly that he could not give his brother-in-law a short extension of time within which to pay the notes?

Another question that presents itself is: If he thought his brother-in-law was solvent and in such a prosperous financial condition why did he require of him a deed of trust on everything he owned, (stock of goods and fixtures, household and kitchen furniture, live stock, growing crops of corn and tobacco and the tobacco already cut, store ac-

counts due him and in his equity in the land) and in that way publish to the world the unfortunate position in which his brother-in-law had placed himself? Did he not know that the creditors would not remain idle but would certainly take steps to try and collect a small part at least of the amounts due them and not permit all of the bankrupt's property, including goods not paid for, to be used to pay the notes secured by said deed?

The court will note that all the information regarding the financial condition of the bankrupt on which the said appellant claims he relied in making said loan is claimed to have been gotten from the said bankrupt and from the father of said bankrupt, the said J. Samuel Jones, who was liable as endorser on said notes, with the exception of certain statements claimed to have been made by J. W. Long, Cashier, both of whom were deeply interested in said notes being taken up. It was but natural and what should have been expected that said bankrupt, in his anxiety and desire to prevent the threatened criminal proceedings, and the said J. Samuel Jones in his anxiety to relieve himself of his liability as endorser on said notes, should make the bankrupt's financial condition appear good to the only party from whom they could hope for aid and help. If they did otherwise, they knew their only hope for the loan that would enable them to take up the notes would be blasted. In this connection, the attention of the court is called to the fact that appellant failed to call and examine the said J. Samuel Jones as a witness to substantiate the alleged statements claimed to have been made by him regarding the bankrupt's financial condition.

With regard to the alleged statements of J. W. Long, Cashier, on which appellant claims he relied in making said loan, Mr. Long denies making same, (R. pp. 63, 67, 90, 91, 94 and 95).

The recollection of the witness, John W. Long, instead of being "very hazy," as stated by appellant on page 17 of

his brief, was exactly the reverse as the record will show.

It is, therefore, respectfully submitted that said appellant as a man of ordinary prudence had knowledge of sufficient facts to have put him on inquiry and caused or incited him, before making the loan, to have inquired into the financial condition of said bankrupt. It was not sufficient for him to rely on the alleged statements of the said bankrupt and his father, both of whom he knew were deeply interested in the taking up of said notes; he should have made diligent investigation for himself in order to find out if the said bankrupt was in fact solvent, and not blindly, so to speak, made the loan. The means of knowledge were at hand and easily gotten. By his own admissions he failed to do what any ordinary prudent man under the circumstances would have done. Knowing that the bankrupt was engaged in the merchandise business and owed bills for merchandise purchased, he failed to make the slightest examinations of his books to find out the amount of his indebtedness for merchandise purchased (R., 115). He never even asked the said bankrupt anything as to the amount he owed on the stock of goods (R., 115). He never requested J. Samuel Jones to send him a statement in writing showing his son's assets and liabilities (R., 115). The bankrupt experienced little difficulty in making up his bankruptcy schedules. His books and papers would have shown his large indebtedness to merchants on account of goods furnished him.

Appellant on page 34 of his brief says:

> "It was a mere coincidence that Dean was present when the money he loaned the bankrupt was used by the bankrupt's father in paying the bankrupt's indebtedness at the bank."

It is an admitted fact in the record that the said Dean met the father of the said bankrupt by appointment in the

city of Petersburg, Virginia, on the day the notes were taken up for the purpose of taking up and getting possession of the notes of said bankrupt held by the banks in that city (R. pp. 105 and 106).

The following language appears on page 42 of appellant's brief:

> "The Circuit Court of Appeals in that case having thus declared the recipients (the banks who received the money loaned by Dean to Jones) of these payments to be preferred creditors, it would seem to have been the duty of the bankrupt's trustee to have pursued these preferred creditors, viz., the banks. But for some reason best known to himself, he abandoned the road thus pointed out in that opinion. He preferred to take another course, and to pursue the man who loaned the money and took security for such present loan. We can only surmise why this has been done. * * *"

In the case above referred to the sole question before the court was the question of the adjudication of the said R. Crawley Jones as an involuntary bankrupt. The banks were not even parties to the litigation and took no part therein, so the court could not have possibly held that the said banks were preferred creditors. No such question was ever raised by the pleadings in said case.

Since the distinguished counsel for appellant have seen fit to criticise the appellee for not making the Virginia National Bank of Petersburg a party to this litigation and seeking recovery of it, the attorney for appellee, in order that his position in the matter may not be misunderstood and the rights of the appellee prejudiced thereby, desires to give to the court the reasons why recovery from said bank was not sought.

The proofs in the case at bar show that no deed of trust was ever given to said bank; that it had no transaction

The following language appears on pages 57 and 58 of appellant's brief:

> "We respectfully submit that the transaction in question did not result in a reduction of the value of the assets of the debtor, * * *"

In reply to the above statement appellee would state that, if the said deed of trust in question is allowed to stand, the result of the transaction will be that the creditors, who sold the said bankrupt merchandise for the conduct of his business, will be deprived of all participation in the assets of said bankrupt. Absolutely nothing will be left for them.

One of the appellant's assignments of error is to the action of the Circuit Court of Appeals in holding said deed of trust invalid under section 60-b of the Bankruptcy Act. This assignment is based on the ground that the appellee failed to take a cross appeal.

Granting for the sake of the argument that the Circuit Court of Appeals was without authority to hold the said deed of trust invalid as an illegal preference under section 60-b, how is the appellant prejudiced thereby? The fact that the said court held the said deed of trust invalid under both section 60-b and section 67-e of said Act could not have prejudiced the appellant. If the said deed of trust is invalid under section 67-e that is sufficient to render the same null and void. No one will contend that the said deed of trust must be invalid under both of said sections in order to render the same null and void.

It is, therefore, respectfully submitted that there is no error in the decree of the Circuit Court of Appeals appealed from and the same should be affirmed.

Respectfully submitted,

BARTLETT ROPER,
Counsel for R. BEALE DAVIS, JR.,
Trustee, Appellee.